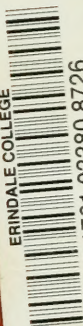


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A. C. McEWEN

HUNT'S

LAW OF

BOUNDARIES, WALLS AND FENCES

Sixth Edition.

REVISED AND SUBSTANTIALLY REWRITTEN

BY

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PREFACE

TO THE SIXTH EDITION.

THIS is more than a New Edition of an old Work. Although the Editor has not undertaken the preparation of a new book on the Law of Boundaries and Fences, he has substantially rewritten the greater part of the late Mr. ARTHUR JOSEPH HUNT's well-known treatise on the subject.

The Editor was asked, because of his connection with the Law of Easements, Prescription and the general Law of Land, to revise the late Author's Work. As the book has passed through several editions by different hands since its first appearance the task has not proved a light one. It is always a difficult matter for a busy practitioner to find the time for writing text-books. In this case the Editor has had to face the additional difficulty inherent in such a subject as that with which this book deals. If the reader be learned he will appreciate this difficulty. There is no narrow code or branch of law peculiar to Boundaries and Fences. The Law of Boundaries and Fences is a part of the general Law of Land. But it is no particular part. The

field of the general Law of Land is very vast. A question relating to a boundary or a fence may require research in one part of that field very remote from other parts. For this reason the book treats of some branches of the law which may appear to the casual reader to be only distantly connected with other branches of the law with which it deals. There may seem to be little or no connection between the Statutory Rules regulating the underpinning of party walls in London, and the presumption of law as to the ownership of the soil of non-tidal river beds ; or between the rights of adjoining owners to lop overhanging branches, and the doctrine of *contemporanea expositio* ; or between the rights of support for his house enjoyed by a householder, and the powers of the Board of Agriculture and Fisheries to ascertain and adjust the boundaries of parochial and other areas. Yet any one of these matters, and of the many others with which this book deals, may become of the utmost importance in determining a question relating to a boundary or a fence, and for this reason all such matters are included in the Work.

The Editor has not deemed it advisable to encumber the book by any treatment of that highly complicated branch of the law which relates to Light. The Editor in his "Law of Light" has dealt exhaustively with that subject, and the reception of that work by both branches

of the profession has been so particularly favourable that he feels justified in referring the reader to its contents for any question relating to windows, ancient lights or the general law of light. In the interests of the reader it is thought to be expedient to avoid any attempt to condense so complicated a branch of the law within the narrow confines of one chapter of a small book.

One of the most useful features of the late Mr. HUNT's book is the collection of the numerous presumptions of law which exist with regard to the Ownership of Highways, Rivers and Fences, and with regard to Boundaries generally. The Editor has paid special attention to the development of this feature of the book. If the reader wishes to appreciate the extent to which these presumptions govern the Law of Boundaries and Fences he would do well to refer to the heading "Presumption" in the Index.

The Editor has exercised his discretion in eliminating certain matter which in his opinion ought not to have been allowed to creep into some of the former Editions. He has further increased the value of the book by inserting a great deal of new material. He has written a new Chapter on the Law of Support, and has rewritten the Introduction and several of the other Chapters, including the Chapter on the

Boundaries of Registered Land, and has generally revised the whole book in the light of modern authorities. While, on the one hand, he has been unsparing in his labours, he has, on the other hand, preserved as far as possible the old features of the book which originally made it so popular amongst members of the legal profession.

R. G. NICHOLSON COMBE.

3, STONE BUILDINGS,
LINCOLN'S INN.
April, 1912.

TABLE OF CONTENTS.

	PAGE
PREFACE	v
TABLE OF STATUTES	xiii
TABLE OF CASES	xv

CHAPTER I.

INTRODUCTION.

SECT.

1.—Scope of the Book	1
2.—Concerning Ownership in Land	2
3.—Rights in Land not Involving Ownership	5
4.—Title Based on Long Possession	18

CHAPTER II.

WATER BOUNDARIES.

1.—The Sea	28
2.—Inland Waters	39
3.—Rights and Obligations of Riparian Owners	50
4.—Rights of Fishing in Non-tidal Waters	58
5.—Sea Walls and River Embankments	62

CHAPTER III.

THE RIGHT OF SUPPORT FOR LAND AND BUILDINGS.

1.—Natural Rights of Support	70
2.—Accessorial Rights of Support	77
3.—Acquisition of the Right of Support to Buildings, etc.	79
4.—Special Statutory Rights and Obligations with Regard to Support	85

CHAPTER IV.

FENCES.

SECT.		PAGE
1.—On Fences Generally...	...	92
2.—Maintenance and Repair of Fences	...	95
3.—Fencing Obligations ...	...	97
SUB-SECT.		
1.—Express Agreements	...	97
2.—Fencing against a Common	...	98
3.—Prescriptive Obligations	...	100
4.—Common Law Obligation to Fence Excavations...		109
5.—Statutory Obligations on Railway Companies to Fence their Lines	...	113
6.—Statutory Obligations on Mineowners to Fence Shafts, etc.	...	116

CHAPTER V.

BARRIERS BETWEEN MINES.

1.—Rights in Respect of Barriers in Mines	...	119
2.—Remedies available for Wrongs done in Respect of Mines	...	123

CHAPTER VI.

PARTY WALLS.

1.—Party Walls and Party Fences outside the Area of the London or Metropolitan Building Acts	...	127
2.—Party Walls within the Area of the London or Metropolitan Building Acts	...	133

CHAPTER VII.

PRESERVATION OF BOUNDARIES AND FENCES BY TENANTS.

1.—Preservation of the Distinguishing Boundaries of the Tenement	...	148
2.—Repair of the Fences of the Tenement	...	149
3.—Remedies in Default of Repair of Fences	...	152

CHAPTER VIII.

BOUNDARIES OF PAROCHIAL AND OTHER AREAS.

SECT.	PAGE
1.—Concerning Parochial Boundaries Generally	155
2.—Statutory Provisions as to the Adjustment of Parochial and other Areas	159
SUB-SECT.	
1.—Under the Land Drainage Acts	159
2.—Under the Tithe Acts	160
3.—Under the Local Government Acts	164
4.—Under the Inclosure Acts	171
5.—Under the Highway Acts	175

CHAPTER IX.

BOUNDARIES OF HIGHWAYS AND PRIVATE WAYS.

1.—Concerning Highways Generally	177
2.—Relationship between Ownership and the Repair of Roads	184
3.—Prevention of Encroachments on Highways	190
4.—Inclosure Roads	195

CHAPTER X.

BOUNDARIES OF REGISTERED LAND	198
--------------------------------------	-----

CHAPTER XI.

BOUNDARY TREES.

1.—Ownership of Boundary Trees	204
2.—Remedies for Injuries arising from Overhanging Branches or Projecting Roots	209
3.—Ownership of Branches and Fruit fallen on Adjoining Lands	214

CHAPTER XII.

EVIDENCE.

SECT.		PAGE
1.—On Evidence Generally	... ..	217
2.—Interpretation of Parcels	... ..	220
3.—Rectification of Deeds	... ..	223
4.— <i>Contemporanea Expositio</i>	... ..	224
5.—Evidence of Reputation	... ..	225
6.—Various Forms of Documentary and other Evidence	... ..	231

CHAPTER XIII.

REMEDIES.

1.—Remedies where Animals Escape through Fences	... ..	246
2.—Remedies in the Case of Party Walls	... ..	250
3.—Remedies for the Wrongful Confusion of Boundaries	... ..	251

INDEX.

TABLE OF STATUTES.

				PAGE
18 Edw. 1, c. 1.	(Statute of <i>Quia Emptores</i> , 1289)	...	...	189
6 Hen. 6, c. 5.	(Statute of Sewers, 1427)	...	...	63
23 Hen. 8, c. 5.	(Statute of Sewers, 1531)	...	...	63, 64
3 & 4 Edw. 6, c. 8.	(Statute of Sewers, 1549)	...	...	63
1 & 2 Phil. & M. c. 12.	...	...	...	247
13 Eliz. c. 9.	(Statute of Sewers, 1571)	...	...	63, 65
29 Car. 2, c. 3.	...	...	...	14
7 Anne, c. 10.	(Statute of Sewers, 1708)	...	...	63
58 Geo. 3, c. 45.	...	...	...	156
59 Geo. 3, c. 134.	...	...	...	156
3 Geo. 4, c. 72.	...	...	...	156
5 Geo. 4, c. 103.	...	...	...	156
7 & 8 Geo. 4, c. 72.	...	...	...	156
1 & 2 Will. 4, c. 38.	...	...	...	157
2 & 3 Will. 4, c. 61.	...	...	...	157
c. 71.	(Prescription Act, 1832)	...	...	24, 25
3 & 4 Will. 4, c. 22.	...	...	...	63—66, 68
c. 27.	...	...	...	19, 131, 251
5 & 6 Will. 4, c. 50.	(Highway Act, 1835)	...	...	118, 175, 176, 187, 190 <i>et seq.</i>
6 & 7 Will. 4, c. 71.	(Tithe Act, 1836)	...	...	160, 241
7 Will. 4 & 1 Vict. c. 69.	...	...	...	161
1 & 2 Vict. c. 107.	...	...	...	157
2 & 3 Vict. c. 49.	...	...	...	157
c. 62.	...	...	...	162
3 & 4 Vict. c. 60.	...	...	...	157
4 & 5 Vict. c. 45.	...	...	...	63
5 & 6 Vict. c. 54.	(Tithe Act, 1842)	...	...	162, 163
6 & 7 Vict. c. 37.	(New Parishes Act, 1843)	...	...	157
7 & 8 Vict. c. 56.	...	...	...	157
c. 94.	(New Parishes Act, 1844)	...	...	157
8 & 9 Vict. c. 20.	(Railways Clauses Consolidation Act, 1845):	...	...	86, 87, 113—115
c. 70.	...	...	...	157
c. 106.	...	...	...	14
c. 118.	(Inclosure Act, 1845)	...	...	171 <i>et seq.</i> , 195 <i>et seq.</i>
9 & 10 Vict. c. 68.	...	...	...	157
c. 70.	(Inclosure Act, 1846)	...	...	174
10 & 11 Vict. c. 17.	(Waterworks Clauses Act, 1847)	...	...	88, 89, 91
11 & 12 Vict. c. 37.	...	...	...	157
12 & 13 Vict. c. 50.	...	...	...	63
c. 83.	(Inclosure Act, 1849)	...	...	172
c. 92.	(Cruelty to Animals Act, 1849)	...	...	248
14 & 15 Vict. c. 97.	...	...	...	157
15 & 16 Vict. c. 79.	(Inclosure Act, 1852)	...	...	171, 172

	PAGE
17 & 18 Vict. c. 32.	157, 196
c. 60. (Cruelty to Animals Act, 1854)	248
c. 97. (Inclosure Act, 1854)	174
18 & 19 Vict. c. 122. (Metropolitan Building Act, 1855) ...	134, 139, 146
19 & 20 Vict. c. 55.	157
c. 104. (New Parishes Act, 1856)	157
21 & 22 Vict. c. 98. (Local Government Act, 1858)	164
23 & 24 Vict. c. 93.	163
24 & 25 Vict. c. 133. (Land Drainage Act, 1861)	63—67, 159
25 & 26 Vict. c. 53. (Land Registry Act, 1862)	175, 198 <i>et seq.</i>
c. 61. (Highway Act, 1862)	187, 194
27 & 28 Vict. c. 101. (Highway Act, 1864)	175, 192
32 & 33 Vict. c. 94.	157
35 & 36 Vict. c. 58.	117
c. 76. (Coal Mines Regulation Act, 1872)	116
c. 77. (Metalliferous Mines Regulation Act, 1872) ;	117, 118
37 & 38 Vict. c. 57. (Real Property Limitation Act, 1874) ...	19
38 & 39 Vict. c. 55. (Public Health Act, 1875)	89, 164, 169
c. 87. (Land Transfer Act, 1875)	199, 200
39 & 40 Vict. c. 61. (Poor Law Amendment Act, 1876)	170
44 & 45 Vict. c. 41. (Conveyancing Act, 1881)	152
45 & 46 Vict. c. 38. (Settled Land Act, 1882)—	
ss. 3, 17 (1)	13
s. 48	160
c. 58.	170
46 & 47 Vict. c. 37. (Public Health Act, 1875 (Support of Sewers),	
Amendment Act, 1883)	89, 91
47 & 48 Vict. c. 65.	157
50 & 51 Vict. c. 58. (Coal Mines Regulation Act, 1887)	116
c. 61. (Local Government (Boundaries) Act, 1887) :	165 <i>et seq.</i>
51 & 52 Vict. c. 41. (Local Government Act, 1888)	165 <i>et seq.</i> , 187, 188
52 & 53 Vict. c. 30. (Board of Agriculture Act, 1889) ...	160, 171, 241
53 & 54 Vict. c. 69. (Settled Land Act, 1890), s. 5	14
54 & 55 Vict. c. 75.	118
55 & 56 Vict. c. 13. (Conveyancing Act, 1892)	153
56 & 57 Vict. c. 32. (Barbed Wire Act, 1893)	194
c. 73. (Local Government Act, 1894)	166 <i>et seq.</i> , 188, 189
57 & 58 Vict. c. 42. (Quarries Act, 1894)	118
c. cxxiii. (London Building Act, 1894)	133 <i>et seq.</i>
58 & 59 Vict. c. 37.	118
59 & 60 Vict. c. 43.	116
61 & 62 Vict. c. 55. (Universities and College Estates Act, 1898) :	14
3 Edw. 7, c. 31.	160, 167, 171, 241
1 & 2 Geo. 5, c. 50. (Coal Mines Act, 1911)	116, 117

TABLE OF CASES.

A.

	PAGE
Abergavenny (Lord) <i>v.</i> Thomas (1739), West, 649; 3 Anst. 668 n.:	259
Absor <i>v.</i> French, 2 Shower, 28; Styles, 364 ...	186
Ackroyd <i>v.</i> Smith (1850), 10 C. B. 164; 19 L. J. C. P. 315; 14 Jur. 1047 ...	8
Acton <i>v.</i> Blundell (1844), 13 L. J. Ex. 289; 12 M. & W. 324 ...	122
Adams <i>v.</i> Marylebone Borough Council, [1907] 2 K. B. 822; 71 J. P. 465; 23 T. L. R. 702 [C. A.] ...	139
Alcock <i>v.</i> Cooke (1829), 7 L. J. (o.s.) C. P. 126; 5 Bing. 340; 2 Moo. & P. 625; 30 R. R. 625 ...	242
Aldin <i>v.</i> Latimer Clark, Muirhead & Co., [1894] 2 Ch. 437; 63 L. J. Ch. 601; 71 L. T. 119; 42 W. R. 453; 8 R. 352 ...	14
Alston, <i>Ex parte</i> , 28 L. T. 337; 5 W. R. 189... ..	35
— <i>v.</i> Scales (1832), 9 Bing. 3; 2 Moo. & S. 5	193
Anderson <i>v.</i> Oppenheimer (1880), 5 Q. B. D. 602; 49 L. J. Q. B. 708 ...	121
Anon, 3 Wils. K. B. 126	249
— (1674), 1 Ventris, 264	100
—, 2 Rolle, 255... ..	204, 206
Anstee <i>v.</i> Nelms (1856), 26 L. J. Ex. 5; 4 W. R. 612; 1 H. & N. 225 ...	243
Anthoney <i>v.</i> Haney (1829), 8 Bing. 186	215
Atkwright <i>v.</i> Gell (1839), 8 L. J. Ex. 201; 5 M. & W. 203 ...	10, 58
Arnold <i>v.</i> Blake (1871), L. R. 6 Q. B. 433; 40 L. J. Q. B. 185; 19 W. R. 1090 ...	185, 186
— <i>v.</i> Holbrook (1873), L. R. 8 Q. B. 96; 42 L. J. Q. B. 80; 28 L. T. 23; 21 W. R. 330 ...	185, 186
Ashby <i>v.</i> White, 2 Ld. Raym. 938	72
Aspden <i>v.</i> Seddon (1875), L. R. 10 Ch. App. 394; 44 L. J. Ch. 359; 32 L. T. (N.S.) 415; 23 W. R. 560 ...	79, 80, 83, 84
Aston <i>v.</i> Exeter (Lord) (1801), 6 Ves. jun. 287	148, 260
Atkins <i>v.</i> Hatton (1793), 2 Anst. 389	240
Att.-Gen. <i>v.</i> Antrobus, [1905] 2 Ch. 188; 69 J. P. 141; 92 L. T. 790; 21 T. L. R. 471 ...	6, 237, 242
— <i>v.</i> Bowyer (1800), 5 Ves. 300; 3 Ves. 714... ..	259
— <i>v.</i> Chamberlaine (1857), 4 K. & J. 292	257
— <i>v.</i> Chambers (1854), 23 L. J. Ch. 662; 4 De G. M. & G. 206; 18 Jur. 779 ...	29, 35—37, 45—47, 125
— <i>v.</i> Conduit Colliery Co., [1895] 1 Q. B. 301; 59 J. P. 70; 64 L. J. Q. B. 207; 71 L. T. 771; 43 W. R. 366 ...	72, 73, 76, 179
— <i>v.</i> Dorking Union (1882), 20 Ch. D. 595; 5 L. J. Ch. 585; 46 L. T. 573; 30 W. R. 579 ...	10
— <i>v.</i> Drummond (1842), 1 Dr. & War. 353	224

	PAGE
Att.-Gen. <i>v.</i> Emerson, [1891] A. C. 649; 55 J. P. 709; 61 L. J. Q. B. 79; 65 L. T. 564	31, 33—35, 61
— <i>v.</i> Fullerton (1813), 2 Ves. & B. 263	148, 149, 260, 261
— <i>v.</i> Great Eastern Rail. Co. (1871), L. R. 6 Ch. App. 572; 19 W. R. 788	52
— <i>v.</i> Great Northern Rail. Co., [1909] 1 Ch. 775; 73 J. P. 41; 78 L. J. Ch. 577 [C. A.]	23
— <i>v.</i> Grieg, [1908] 1 Ch. 327; 72 J. P. 97; 77 L. J. Ch. 261; 97 L. T. 737; 24 T. L. R. 53 [C. A.]	134
— <i>v.</i> Hammer (1858), 27 L. J. Ch. 837; 31 L. T. 379; 4 Jur. (N.S.) 751	31
— <i>v.</i> Jones (1862), 33 L. J. Ex. 249; 6 L. T. 655; 2 H. & C. 347	34
— <i>v.</i> Logan, [1891] 2 Q. B. 100; 55 J. P. 615; 65 L. T. 162; 7 T. L. R. 279	214
— <i>v.</i> Parker (1747), 3 Atk. 576	224
— <i>v.</i> Reeve, 1 T. L. R. 676	37
— <i>v.</i> Richards, Anst. 603	30
— <i>v.</i> St. Aubyn (1810), Wightw. 167	257
— <i>v.</i> Simpson, [1901] 2 Ch. 698	10
— <i>v.</i> Stawell (1793), 2 Anst. 601	151
— <i>v.</i> Stephens (1855), 24 L. J. Ch. 694; 25 L. J. Ch. 888; 6 De G. M. & G. 111; 1 Kay & J. 724	148, 149, 260, 261
— <i>v.</i> Terry (1874), L. R. 9 Ch. App. 423; 30 L. T. 215; 22 W. R. 395	40
— <i>v.</i> Tomline (1880), 14 Ch. D. 58; 12 Ch. D. 214; 44 J. P. 617; 49 L. J. Ch. 377; 42 L. T. 380; 28 W. R. 870	63
Austen <i>v.</i> Nelms (1856), 1 H. & N. 225	221
Austerberry <i>v.</i> Oldham (1885), 29 Ch. D. 750; 49 J. P. 532; 55 L. J. Ch. 633; 53 L. T. 543; 33 W. R. 807 [C. A.]	98
Aynsley <i>v.</i> Glover (1875), L. R. 10 Ch. App. 283; 44 L. J. Ch. 523; 32 L. T. 345; 23 W. R. 457	25

B.

Backhouse <i>v.</i> Bonomi (1861), 34 L. J. Q. B. 181; 4 L. T. 754; 9 W. R. 769; 9 H. L. C. 503; 7 Jur. (N.S.) 809	71, 73
Bailey <i>v.</i> Appleyard (1838), 7 L. J. Q. B. 145; 8 A. & E. 161; 3 Nev. & P. (Q. B.) 257	7
Baily & Co. <i>v.</i> Clark, Son and Morland, [1902] 1 Ch. 649; 71 L. J. Ch. 396; 86 L. T. 309; 50 W. R. 511; 18 T. L. R. 364	50, 58
Baird <i>v.</i> Williamson (1864), 15 C. B. (N.S.) 376; 33 L. J. C. P. 101; 9 L. T. 412; 12 W. R. 150; 10 Jur. (N.S.) 152	121
Baker <i>v.</i> Greenhill, 3 Q. B. 148; 11 L. J. Q. B. 161, 435; 6 Jur. 710; 2 Gal. & Dav. 435	190
Ball <i>v.</i> Ray (1873), L. R. 8 Ch. App. 467; 28 L. T. 346; 21 W. R. 282	4
Barber <i>v.</i> Whiteley (1865), 34 L. J. Q. B. 212; 13 L. T. 319; 13 W. R. 774; 11 Jur. (N.S.) 822	98
Barker <i>v.</i> Richardson (1821), 4 B. & Ald. 579; 23 R. R. 400	27
Barnes <i>v.</i> Mawson (1813), 1 M. & S. 81	227
— <i>v.</i> Ward (1850), 9 C. B. 392; 19 L. J. C. P. 195; 14 Jur. 334; 2 Car. & Kir. 661	110
Baxendale <i>v.</i> McMurray (1867), L. R. 2 Ch. App. 790; 15 W. R. 32	10, 56

	PAGE
Beale v. Kyte, [1907] 1 Ch. 564; 76 L. J. Ch. 294; 96 L. T. 390 ...	223
Bealey v. Shaw (1805), 6 East. 208 ...	56
Bean v. Bloom (1773), 2 W. Bla. 926 ...	13
Beauchamp (Earl) v. Winn (1873), L. R. 6 H. L. 223; 22 W. R. 193 ...	33
Beaudley v. Brook (1607), Cro. Jac. 189 ...	16
Beaufort (Duke) v. John Aird & Co. (1904), 20 T. L. R. 602 ...	242
— v. Swansea Corporation (1849), 3 Ex. 413 ...	31, 224
Beaufort v. Smith (1849), 19 L. J. Ex. 97; 4 Ex. 450 ...	240
Beckett v. Leeds Corporation (1871), L. R. 7 Ch. App. 421; 26 L. T. 375; 20 W. R. 454 ...	179—181, 186
Bedle v. Beard (1606), 12 Co. Rep. 5 ...	22
Beeston v. Weate (1856), 5 E. & B. 986; 25 L. J. Q. B. 115; 4 W. R. 325; 2 Jur. (N.S.) 546 ...	10, 56
Belfast Dock Act, <i>In re</i> , 1 Ir. Rep. 128 ...	232
Bell v. Dudley, [1895] 1 Ch. 182; 59 J. P. 199; 64 L. J. Ch. 291; 72 L. T. 14; 43 W. R. 122; 13 R. 120 ...	83, 84
— v. Love (1883), 10 Q. B. D. 547; 47 J. P. 468; 52 L. J. Q. B. 290; 48 L. T. 592 [C. A.] ...	76, 126
Belmore v. Kent County Council, [1901] 1 Ch. 873; 65 J. P. 456; 70 L. J. Ch. 501; 49 W. R. 459 ...	177
Benfieldside Local Board v. Consett Iron Co. (1877), 3 Ex. D. 54; 47 L. J. Ex. 491; 38 L. T. 530; 26 W. R. 114 ...	82
Bennet v. Costar (1818), 8 Taunt. 183 ...	60
Bennett v. Griffiths (1861), 30 L. J. Q. B. 98; 3 L. T. 735; 9 W. R. 332; 7 Jur. (N.S.) 284 ...	125
Bennitt v. Whitehouse (1860), 29 L. J. Ch. 326; 3 L. T. 735; 23 Beav. 119 ...	125
Berdsley v. Pilkington (1588), Gould. 100 ...	248
Berridge v. Ward (1861), 10 C. B. (N.S.) 400; 30 L. J. C. P. 218; 7 Jur. (N.S.) 876 ...	158, 180
Bidder v. Bridges (No. 2) (1885), 54 L. T. 529; 34 W. R. 514; W. N. (1886) 148 ...	242
Birmingham Corporation v. Allen (1877), 6 Ch. D. 284; 46 L. J. Ch. 673; 37 L. T. 207; 25 W. R. 810 [C. A.] ...	70
Birmingham. Dudley and District Banking Co. v. Ross (1888), 38 Ch. D. 295; 57 L. J. Ch. 601; 59 L. T. 609; 36 W. R. 914 [C. A.] ...	15
Blackie v. Clark (1852), 22 L. J. Ch. 377; 15 Beav. 595 ...	223
Blandy-Jenkins v. Dunraven (Earl of), [1899] 2 Ch. 121; 68 L. J. Ch. 589; 81 L. T. 209 [C. A.] ...	233
Blewett v. Tregonning (1835), 4 L. J. K. B. 234; 3 Ad. & E. 554; 5 Nev. & M. (K. B.) 308 ...	7, 12
Bliss v. Hall (1838), 7 L. J. C. P. 122; 4 Bing. N. C. 183; 2 Jur. 110; 5 Scott, 500; 6 Dowl. 442; 1 Arn. 19 ...	11
Bloomfield v. Johnson (1867), Ir. R. 8 C. L. 89 ...	49
Blount v. Layard (1888), [1891] 2 Ch. 681 n. ...	41, 62
Blundall v. Catterall (1821), 5 B. & Ald. 268; 24 R. R. 353 ...	29, 31, 32
Blyth v. Topham (1607), Cro. Jac. 158 ...	111
Boden v. Roscoe, [1894] 1 Q. B. 608; 70 L. T. 450 ...	95, 246, 248
Bolton v. Bolton (1879), 11 Ch. D. 968; 48 L. J. Ch. 467; 40 L. T. 582 ...	16
Bonomi v. Backhouse (1858), E. B. & E. 622 ...	72
Booth v. Alcock (1873), L. R. 8 Ch. App. 663; 29 L. T. 231; 21 W. R. 743 ...	12
Bootle Union v. Whitehaven Union, [1903] 2 Ch. 142; 72 L. J. Ch. 582; 19 T. L. R. 453; 51 W. R. 550 ...	167

	PAGE
Bourke v. Davis (1889), 44 Ch. D. 110; 62 L. T. 34; 38 W. R. 167 ...	43
Bower v. Peate (1876), 1 Q. B. D. 321; 45 L. J. Q. B. 446; 35 L. T. 321 ...	128, 144, 145
Bowman v. Edwards (1660), 1 Ch. Cas. 146 ...	256
Boyle v. Tamlin (1827), 5 L. J. (o.s.) K. B. 134; 6 B. & C. 329; 9 Dow. & Ry. (K. B.) 430; 30 R. R. 343...	95, 104, 106
Bradbee v. Christ's Hospital (1843), 4 M. & G. 761 ...	130
Breton v. Knight (1837), cited in Roscoe's Evid. at N. P. (18th ed.), 220 ...	232
Bridgewater v. Bootle (1866), L. R. 2 Q. B. 4; 36 L. J. Q. B. 41; 15 L. T. 351; 15 W. R. 169; 7 B. & S. 348: ...	38, 158
——— v. Edwards (1733), 6 Bro. P. C. 368 ...	256
Bridgman v. Jennings (1699), 1 Ld. Raym. 734 ...	235, 236
Bright v. Walker (1834), 1 C. M. & R. 211 ...	24, 26
Bright-Smith, <i>In re</i> (1886), 31 Ch. D. 314; 55 L. J. Ch. 365; 54 L. T. 47; 34 W. R. 252 ...	220
Brinckman v. Matley, [1904] 2 Ch. 313; 68 J. P. 534; 73 L. J. Ch. 642; 91 L. T. 429; 2 L. G. R. 1057 [C. A.] ...	30, 32
Brisco v. Lomax (1838), 7 L. J. Q. B. 1482; 2 Jur. 682; 8 A. & E. 213; 3 Nev. & P. (K. B.) 308 ...	230, 231
Bristowe v. Cormican (1878), 3 App. Cas. 641 ...	41, 49, 234
Brocket, <i>In re</i> , [1908] 1 Ch. 185; 77 L. J. Ch. 245; 97 L. T. 780; 52 Sol. J. 159...	222
Brocklebank v. Thompson, [1903] 2 Ch. 344; 72 L. J. Ch. 626; 89 L. T. 209; 19 T. L. R. 285 ...	7
Brook v. Jenney, 2 Q. B. 265 ...	191
Brown v. Alabaster (1887), 37 Ch. D. 490; 57 L. J. Ch. 255; 58 L. T. 265; 36 W. R. 155 ...	16
——— v. Dunstable Corporation, [1899] 2 Ch. 378; 63 J. P. 519; 68 L. J. Ch. 498; 80 L. T. 650; 47 W. R. 538; 15 T. L. R. 386 ...	10
——— v. Robbins (1859), 4 H. & N. 186 ...	76
——— Windsor (1830), 1 C. & J. 20 ...	129
Bryan v. Whistler (1828), 6 L. J. (o.s.) K. B. 302; 8 B. & C. 288; 2 Man. & Ry. (K. B.) 318 ...	14
Bullard v. Harrison (1815), 4 M. & S. 387; 16 R. R. 493 ...	16, 186
Burrows v. Lang, [1901] 2 Ch. 502; 70 L. J. Ch. 607; 84 L. T. 623; 49 W. R. 564...	26, 57, 58
Bute (Marquis of) v. Glamorganshire Canal Co. (1846), 15 L. J. Ch. 60; 1 Ph. 681...	258
Butterknowle Coll. Co. v. Bishop Auckland Co., [1906] A. C. 305; 70 J. P. 361; 75 L. J. Ch. 541; 94 L. T. 795; 22 T. L. R. 516 ...	70, 71, 83, 84
Butterley Co., Limited v. New Hucknall Colliery Co., Limited, [1909] 1 Ch. 37; 78 L. J. Ch. 63; 99 L. T. 818; 25 T. L. R. 45; 53 Sol. J. 45 [C. A.]; affirmed, [1910] A. C. 381; 79 L. J. Ch. 411; 102 L. T. 609; 26 T. L. R. 415; 47 Sc. L. R. 901: ...	72, 83, 84
Buxton v. North Eastern Rail. Co. (1868), L. R. 3 Q. B. 549; 37 L. J. Q. B. 258; 18 L. T. 795; 16 W. R. 1124; 9 B. & S. 824 ...	114, 115

C.

Campbell v. Wilson (1803), 3 East, 294 ...	27
Carlyon v. Lovering (1856), 1 H. & N. 784; 26 L. J. Ex. 251; 5 W. R. 347 ...	10

	PAGE
<i>Carr v. Mostyn</i> (1850), 5 Ex. 69; 19 L. J. Ex. 249 ...	240
<i>Carruthers v. Hollis</i> (1838), 8 A. & E. 113; 3 Nev. & P. (K. B.) 246; 1 W. W. & H. 264; 2 Jur. 871 ...	249
<i>Carter v. Murcot</i> (1768), 4 Burr. 2162 ...	62
<i>Central London Rail. Co. v. City of London Land Tax Commissioners</i> , [1911] 2 Ch. 467; 75 J. P. 529; 81 L. J. Ch. 20; 105 L. T. 391; 27 T. L. R. 561; 55 Sol. J. 714; 9 L. G. R. 1166 [C.A.]:	179
<i>Chad v. Tilsed</i> (1821), 5 Moo. 192 ...	34
<i>Chadwick v. Marsden</i> (1865), L. R. 2 Ex. 285; 36 L. J. Ex. 177; 16 L. T. 666; 15 W. R. 964 ...	121
— <i>v. Trower</i> (1839), 6 Bing. N. C. 1; 8 L. J. Ex. 286; 8 Scott. 1 ...	77
<i>Chamber Colliery Co. v. Hopwood</i> (1886), 32 Ch. D. 549; 55 L. J. Ch. 859; 55 L. T. 449 ...	27
— <i>v. Rochdale Canal Co.</i> , [1894] 2 Q. B. 632; 63 L. J. Q. B. 811; [1895] A. C. 564; 64 L. J. Q. B. 645; 73 L. T. 258; 11 R. 264 ...	89
<i>Chapman v. Robinson</i> , 1 E. & E. 25; 5 Jur. (N.S.) 434 ...	192
<i>Chasemore v. Richards</i> (1859), 7 H. L. C. 349; 2 H. & N. 168; 29 L. J. Ex. 81; 7 W. R. 685 ...	50, 75, 122
<i>Cheetham v. Hampson</i> (1791), 4 T. R. 318 ...	100, 109, 149—151
<i>Chesterfield (Lord) v. Harris</i> , [1908] 2 Ch. 397; 77 L. J. Ch. 688; 99 L. T. 558; 24 T. L. R. 763; 52 Sol. J. 639 [C.A.]; [1911] A. C. 623; 80 L. J. Ch. 626; 105 L. T. 453; 27 T. L. R. 548; 55 Sol. J. 686 [H. L.] ...	11, 60, 244
<i>Child v. Hearn</i> (1874), L. R. 9 Ex. 176; 43 L. J. Ex. 100; 22 W. R. 864 ...	114
<i>Chilton v. London Corporation</i> (1878), 7 Ch. D. 562; 47 L. J. Ch. 433; 38 L. T. 498; 26 W. R. 627... ...	12, 216
<i>Churchill v. Evans</i> (1809), 1 Taunt. 529 ...	95, 110
<i>Clarke v. Yonge</i> (1842), 5 Beav. 523 ...	256
<i>Clayton v. Cookes</i> (1742), 2 Atk. 449 ...	259
<i>Clothier v. Chapman</i> (1805), 14 East, 331 ...	229
<i>Coaker v. Willcocks</i> , [1911] 1 K. B. 649; 103 L. T. 806; 27 T. L. R. 137; 55 Sol. J. 155; affirmed, [1911] 2 K. B. 124; 80 L. J. K. B. 1026; 104 L. T. 769; 27 T. L. R. 357 [C. A.] ...	95, 103, 107, 109, 248
<i>Coggins v. Bennett</i> (1877), 2 C. P. D. 568 ...	193
<i>Colebeck v. Girdlers' Co.</i> (1876), 1 Q. B. D. 234; 45 L. J. Q. B. 225; 34 L. T. 350; 24 W. R. 577... ...	129
<i>Colwell v. St. Pancras Borough Council</i> , [1904] 1 Ch. 707; 68 J. P. 286; 73 L. J. Ch. 275; 90 L. T. 153; 52 W. R. 523; 20 T. L. R. 236; 2 L. G. R. 518... ...	4
<i>Commissioners of Sewers v. Glasse</i> (1874), L. R. 19 Eq. 134; 44 L. J. Ch. 129; 31 L. T. 495; 23 W. R. 102... ...	215
<i>Constable's Case</i> (1601), 5 Co. Rep. 106 a; And. 86 ...	40
<i>Constable v. Nicholson</i> (1863), 14 C. B. (N.S.) 230; 32 L. J. C. P. 240; 11 W. R. 698 ...	12
<i>Cook v. Bath (Mayor of)</i> (1868), L. R. 6 Eq. 177 ...	214
<i>Cooke v. Green</i> , 11 Price, 736 ...	180
<i>Coombes v. Coether</i> (1829), M. & M. 398 ...	228, 240
<i>Cooper v. Inch Hall Co., W. N.</i> (1876) 24 ...	125
— <i>v. Phibbs</i> (1867), L. R. 2 H. L. 149; 16 L. T. 678; 15 W. R. 1049 ...	59
<i>Copestake v. West Sussex County Council</i> , [1911] 2 Ch. 331; 75 J. P. 465; 80 L. J. Ch. 673; 105 L. T. 298; 9 L. G. R. 905 ...	237, 238
<i>Coppinger v. Gubbins</i> (1846), 9 Ir. Eq. Rep. 304; 3 Jo. & Lat. 397 ...	153

	PAGE
Corbett <i>v.</i> Hill (1870), L. R. 9 Eq. 671 ; 39 L. J. Ch. 547 ; 22 L. T. 263	136
Cornwell <i>v.</i> Metropolitan Commissioners of Sewers (1855), 10 Ex. 771 ; 3 C. L. R. 417	112
Corry <i>v.</i> Great Western Rail. Co. (1880), 6 Q. B. D. 237 ; (1881) 7 Q. B. D. 322 ; 45 J. P. 312 ; 50 L. J. Q. B. 386 ; 44 L. T. 701 ; 29 W. R. 623	115
Coupland <i>v.</i> Hardingham (1813), 2 Camp. 398	110
Coward <i>v.</i> Gregory (1866), L. R. 2 C. P. 153 ; 36 L. J. C. P. 1 ; 15 L. T. 279 ; 12 Jur. (N.S.) 1000 ; 15 W. R. 170	153
Cowen <i>v.</i> Truefitt, Limited, [1899] 2 Ch. 309 ; 68 L. J. Ch. 563 ; 81 L. T. 104 ; 47 W. R. 661 [C. A.]	221, 223
Cowper <i>v.</i> Clarke (1732), 3 P. Wms. 157	258
Cox <i>v.</i> Burbidge, 13 C. B. 430 ; 32 L. J. C. P. 89 ; 9 Jur. (N.S.) 970 ; 11 W. R. 435	95
Craven <i>v.</i> Pridmore (1902), 18 T. L. R. 282	94
Crease <i>v.</i> Barrett (1835), 1 C. M. & R. 919	243
Crofts <i>v.</i> Haldane (1867), L. R. 2 Q. B. 194 ; 8 B. & S. 194 ; 36 L. J. Q. B. 85 ; 16 L. T. 116 ; 15 W. R. 444	136
Crosby <i>v.</i> Alhambra, Limited, [1907] 1 Ch. 295 ; 76 L. J. Ch. 176 :	137, 141
Cross <i>v.</i> Lewes (1824), 2 B. & C. 686 ; 2 L. J. (O.S.) K. B. 136 ; 4 Dow. & Ry. 234	23
Crossley & Sons, Limited <i>v.</i> Lightowler (1867), L. R. 2 Ch. App. 478 ; 36 L. J. Ch. 584 ; 16 L. T. 438 ; 15 W. R. 801	10, 55, 56
Croughton <i>v.</i> Blake (1843), 12 M. & W. 205 ; 13 L. J. Ex. 78 ; 8 Jur. 275	240
Crowhurst <i>v.</i> Amersham Burial Board (1878), 4 Ex. D. 5 ; 48 L. J. Ex. 109 ; 39 L. T. 355 ; 27 W. R. 95	210
Crump <i>v.</i> Lambert (1867), L. R. 3 Eq. 409 ; 15 L. T. 600 ; 15 W. R. 417	4, 10
Cubitt <i>v.</i> Porter (1828), 8 B. & C. 257 ; 2 Man. & Ry. (K. B.) 267 ; 6 L. J. (O.S.) K. B. 306	127, 132, 250
Cuckfield District Council <i>v.</i> Goring, [1898] 1 Q. B. 865 ; 62 J. P. 358 ; 67 L. J. Q. B. 529 ; 78 L. T. 530 ; 46 W. R. 541 ; 14 T. L. R. 362	190
Cunningham <i>v.</i> Butler (1861), 3 Giff. 37 ; 4 L. T. 234 ; 7 Jur. (N.S.) 461	220
Curtis <i>v.</i> Kesteven County Council (1890), 45 Ch. D. 504 ; 60 L. J. Ch. 103 ; 63 L. T. 543 ; 39 W. R. 199	188
Curzon <i>v.</i> Lomax, 5 Esp. 60	227

D.

Dalton <i>v.</i> Angus (1881), 6 App. Cas. 740 ; 46 J. P. 132 ; 50 L. J. Q. B. 689 ; 44 L. T. 844 ; 30 W. R. 191	4, 22, 23, 25, 26, 70, 72, 75, 78, 79, 81, 128, 129, 144, 145
Daniel <i>v.</i> Hanslip (1672), 2 Lev. 67	10
— <i>v.</i> Wilkin (1852), 7 Ex. 429 ; 21 L. J. Ex. 236	239
Darley Main Colliery Co. <i>v.</i> Mitchell (1886), 11 App. Cas. 127 ; 51 J. P. 148 ; 55 L. J. Q. B. 529 ; 54 L. T. 882	71, 73, 74, 123, 124
Darlington <i>v.</i> Bowes (1759), 1 Eden. 270	149
Davenport <i>v.</i> Bromley (1672), Rep. t. Finch, 17	259
Davies <i>v.</i> Davies (1841), 4 Beav. 54	223
— <i>v.</i> Davies (1887), 36 Ch. D. 359 ; 56 L. J. Ch. 962 ; 58 L. T. 209 ; 36 W. R. 86 [C. A.]	219

	PAGE
Davies v. Fitton, 2 D. & War. 225	223
— v. Sear (1869), L. R. 7 Eq. 427; 38 L. J. Ch. 545; 20 L. T. 56; 17 W. R. 390	16
— v. Williams (1851), 16 Q. B. 546; 20 L. J. Q. B. 330; 15 Jur. 752	212
Davis v. Blackwall Rail. Co. (1840), 1 M. & Gr. 799; 2 Sco. N. R. 74; 2 Rail. Cas. 308; 1 Drink. 9	130
— v. Shepherd (1866), L. R. 1 Ch. App. 410; 35 L. J. Ch. 581; 15 L. T. 122	2, 222
— v. Treharne (1881), 6 App. Cas. 460; 50 L. J. Q. B. 665; 29 W. R. 869	70, 71
Davison v. Gill (1800), 1 East, 64	196
De la Warr (Earl) v. Miles (1881), 17 Ch. D. 535; 50 L. J. Ch. 754; 44 L. T. 487; 29 W. R. 809	12, 224
Debenham v. Metropolitan Board of Works (1880), 6 Q. B. D. 112; 45 J. P. 190; 50 L. J. M. C. 29; 43 L. T. 596; 29 W. R. 353	139
Dent Commutation, <i>In re</i> (1845), 8 Q. B. 43	162
Devonshire (Duke) v. Pattinson (1887), 20 Q. B. D. 263; 52 J. P. 276; 57 L. J. Q. B. 189; 58 L. T. 392	42, 43, 59, 181
Dickens v. Shaw (1822), Moo. History of Foreshore, 451	34
Dittons Urban District Council v. Marks, 66 J. P. 243; 71 L. J. K. B. 309; 86 L. T. 222; 50 W. R. 330; 18 T. L. R. 333; [1903] 2 K. B. 452	190
Dodd v. Holme (1834), 1 A. & E. 493; 3 N. & M. 739	130
Doddington's Case (1594), 2 Rep. 32 b.	222
Doe v. Ashley (1847), 10 Q. B. 663	221
— d. Barrett v. Kemp (1831), 7 Bing. 332; 5 Moo. & P. 173	183
— d. Didsbury v. Thomas (1811), 14 East, 323	230
— d. Harrison v. Hampson (1847), 4 C. B. 267; 17 L. J. C. P. 225	183
— v. Hubbard (1850), 15 Q. B. 236	221
— d. Hughes v. Lakin (1836), 7 C. & P. 481	235, 237
— d. Molesworth v. Sleeman (1846), 9 Q. B. 298; 15 L. J. Q. B. 338; 10 Jur. 568	227
— d. Parkin v. Parkin (1814), 5 Taunt. 321	222
— v. Pearsey (1827), 7 B. & C. 304; 9 D. & R. 908	179, 180, 182
— d. Smith v. Cartwright (1824), 1 C. & P. 218	243
— d. Smith v. Galloway (1833), 5 B. & Ad. 43; 2 L. J. K. B. 182; 2 Nev. & M. 240	220
— d. Stansbury v. Arkwright (1833), 2 A. & E. 182 n.; 2 L. J. K. B. 102; 1 Nev. & M. 731	243
— d. Strode v. Seaton (1834), 2 A. & E. 171; 4 L. J. K. B. 13; 4 Nev. & M. (K. B.) 81	243
— d. William 4, Jones v. Roberts (1844), 13 M. & W. 520; 14 L. J. Ex. 274	232, 238
Donegal v. Templemore, 9 Ir. C. L. R. 374	232
Dowglass v. Kendal (1610), Cro. Jac. 256	13
Drew's Estate, <i>In re</i> ; <i>Ex parte</i> Mason (1866), L. R. 2 Eq. 206; 35 L. J. Ch. 845; 35 Beav. 443; 14 L. T. 278; 12 Jur. (N.S.) 425	97
Drewell v. Towler (1832), 3 B. & Ad. 735; 1 L. J. K. B. 228	9
Drury v. Army and Navy Supply, Limited, [1896] 2 Q. B. 271; 60 J. P. 421; 65 L. J. M. C. 169; 74 L. T. 621; 44 W. R. 560	136
Dublin and Kingstown Rail. Co. v. Bradford (1857), 7 Ir. C. L. R. 57, 624	221
Dudley Canal Co. v. Grazebrook (1830), 1 B. & Ad. 59; 8 L. J. (o.s.) K. B. 361	86, 89

	PAGE
Dudley Corporation, <i>In re</i> (1881), 8 Q. B. D. 86; 46 J. P. 340; 51 L. J. Q. B. 121; 45 L. T. 733 [C. A.] ...	83, 90
Duncombe's Case, 1 Roll. Abr. 390; Cro. Car. 366; 2 Ld. Raym. 1170 ...	185
Dunraven v. Llewellyn (1850), 15 Q. B. 791; 19 L. J. Q. B. 388 ...	230
Dwyer v. Rich (1871), Ir. Rep. 6 C. L. 144 ...	42, 180
Dyne v. Nutley (1853), 14 C. B. 122; 2 C. L. R. 81 ...	221

E.

Eadon v. Jeffercock (1872), L. R. 7 Ex. 379; 42 L. J. Ex. 36; 28 L. T. 273; 20 W. R. 1033 ...	83
Earl v. Lewis (1801), 4 Esp. 1 ...	240, 241
East v. Harding (1595), Cro. Eliz. 478 ...	152
Easton v. Richmond Highway Board (1871), L. R. 7 Q. B. 69; 41 L. J. M. C. 25; 25 L. T. 586; 20 W. R. 203 ...	193
Ecroyd v. Coulthard, [1898] 2 Ch. 358; [1897] 2 Ch. 554; 61 J. P. 791; 66 L. J. Ch. 751; 77 L. T. 357; 46 W. R. 119 ...	59, 61
Edgar v. English Fisheries Special Commissioners (1870), 23 L. T. 732 ...	60
Elliot v. North Eastern Rail. Co. (1863), 10 H. L. C. 333; 32 L. J. Ch. 402; 8 L. T. 337; 11 W. R. 604; 9 Jur. (N.S.) 555; 2 New Rep. 87 ...	75, 123
Ellis v. Loftus Iron Co. (1874), L. R. 10 C. P. 10; 44 L. J. C. P. 24; 31 L. T. 483; 23 W. R. 246 ...	96, 248
— v. London and South Western Rail. Co., 26 L. J. Ex. 349; 5 W. R. 682; 2 H. & N. 424; 3 Jur. (N.S.) 1008 ...	211
Embrey v. Owen (1851), 6 Ex. 353; 20 L. J. Ex. 212; 15 Jur. 653; 50— 54, 72	
English v. Metropolitan Water Board, [1907] 1 K. B. 588; 71 J. P. 313; 76 L. J. K. B. 361; 96 L. T. 573; 23 T. L. R. 313; 5 L. G. R. 384 ...	75
Ennor v. Barwell (1860), 4 L. T. 597; 6 Jur. (N.S.) 1233; 2 Giff. 410; 1 De G. F. & J. 529 ...	125
Erskine v. Adeane (1873), L. R. 8 Ch. 756; 42 L. J. Ch. 835; 29 L. T. 234; 21 W. R. 802 ...	210
Evans v. Merthyr Tydfil Urban District Council, [1899] 1 Ch. 241; 68 L. J. Ch. 175 ...	238
— v. Mostyn (1877), 2 C. P. D. 547; 47 L. J. M. C. 25; 36 L. T. 856 ...	117
— v. Oakley (1843), 1 C. & K. 125 ...	192
— v. Rees (1839), 10 A. & E. 151; 2 P. & D. 626 ...	228, 232
— v. Taylor (1838), 7 A. & E. 617; 3 N. & P. 174 ...	239

F.

Faldo v. Ridge, Yelv. 74 ...	100, 108, 109
Fenna v. Clare, [1895] 1 Q. B. 199; 64 L. J. Q. B. 238 ...	195
Ferrand v. Bingley District Council, [1903] 2 K. B. 445; 72 L. J. K. B. 734; 19 T. L. R. 592 ...	189
Field v. Thorne, 20 L. T. (N.S.) 563 ...	192
Fisher v. Prowse (1862), 2 B. & S. 771; 31 L. J. Q. B. 212; 6 L. T. 711; 8 Jur. (N.S.) 1208 ...	112
Fishery Case (The), (1610), Dav. Ir. 55 ...	60
Fitzgerald v. Firbank, [1897] 2 Ch. 96; 66 L. J. Ch. 529; 56 L. T. 584 ...	11, 12

	PAGE
Fitzhardinge (Lord) v. Purcell, [1908] 2 Ch. 139; 72 J. P. 276; 77 L. J. Ch. 529; 99 L. T. 154; 24 T. L. R. 564 ...	29—34, 40
Fletcher v. Rylands (1866), L. R. 1 Ex. 265 (<i>see also</i> Rylands v. Fletcher) ...	95, 96
— v. Smith (1877), 2 App. Cas. 781; 47 L. J. Ex. 4; 37 L. T. 367; 26 W. R. 83 ...	121
Ford v. Lacey (1861), 30 L. J. Ex. 352; 7 Jur. (N.S.) 684; 7 H. & N. 151 ...	44
Forsdick v. Collins (1814), 1 Stark. 173 ...	214
Foster v. North Hendre Mining Co., [1891] 1 Q. B. 71; 55 J. P. 103; 60 L. J. M. C. 6; 63 L. T. 458; 17 Cox C. C. 216 ...	117
— v. Owen (1892), 9 T. L. R. 22 ...	117
— v. Warblington Urban District Council, [1906] 1 K. B. 648; 70 J. P. 233; 75 L. J. K. B. 514; 94 L. T. 876; 54 W. R. 575; 22 T. L. R. 421; 4 L. G. R. 735 [C. A.] ...	33, 35
— v. Wright (1878), 4 C. P. D. 438; 44 J. P. 7; 49 L. J. C. P. 97 ...	44, 46, 48, 59
Fountaine, <i>In re</i> , [1909] 2 Ch. 382; 78 L. J. Ch. 648; 101 L. T. 83; 25 T. L. R. 689 [C. A.] ...	243
Frampton v. Tiffin, 2 Jur. 986 ...	191
Francis v. Hayward (1882), 20 Ch. D. 773; 52 L. J. Ch. 12; 46 L. T. 659; 30 W. R. 744; affirmed, 22 Ch. D. 177; 47 J. P. 517; 52 L. J. Ch. 291; 48 L. T. 297; 31 W. R. 488 [C. A.] ...	9
Frederick Betts, Limited v. Pickfords, Limited, [1906] 2 Ch. 87; 75 L. J. Ch. 483; 94 L. T. 363; 54 W. R. 476; 22 T. L. R. 315 ...	134
Free Fishers of Whitstable v. Gann (1865), 11 H. L. C. 192; 35 L. J. C. P. 29; 12 L. T. (N.S.) 150; 13 W. R. 589 ...	29

G.

Gann v. Free Fishers of Whitstable (1865), 11 H. L. C. 192; 20 C. B. (N.S.) 1; 35 L. J. C. P. 29; 12 L. T. 150; 13 W. R. 589; 29, 30, 40	
Gardner v. Hodgson's Kingston Brewery Co., [1903] A. C. 229; 72 L. J. Ch. 558; 88 L. T. 698; 54 W. R. 17; 19 T. L. R. 458 ...	26, 27
Gaved v. Martyn (1865), 19 C. B. (N.S.) 732; 34 L. J. C. P. 353; 13 L. T. 74; 14 W. R. 62; 11 Jur. (N.S.) 1017 ...	10
Gayford v. Moffatt (1868), L. R. 4 Ch. App. 133 ...	16
— v. Nicholls (1854), 9 Ex. 702; 23 L. J. Ex. 205; 2 C. L. R. 1066 ...	76, 130
Georges v. Stanfield (1597), Cro. Eliz. 593 ...	152
Gerard (Lord) and London and North Western Rail. Co. (<i>In re</i> Arbitration between), [1895] 1 Q. B. 459; 64 L. J. Q. B. 260; 72 L. T. 142; 43 W. R. 374; 14 R. 201 [C. A.] ...	86
Gery v. Redman (1875), 1 Q. B. D. 161; 45 L. J. Q. B. 267; 24 W. R. 270 ...	184
Gifford v. Williams, L. R. 5 Ch. App. 546; 38 L. J. Ch. 598 ...	241
— v. Yarborough (Lord), 5 Bing. 163 ...	47
Girdlestone v. Stanley, 3 Y. & Co. 421; 3 Jur. 382 ...	161
Glynn v. Scawen (1675), Rep. t. Finch, 239 ...	260
Godfrey v. Littel (1829), 1 R. & M. 59; 2 R. & M. 639; Tambl. 230; 257, 260	
Godmanchester v. Phillips (1836), 4 A. & E. 560; 6 N. & M. 211; 1 H. & W. 686 ...	184
Godwin v. Schweppes, Limited, [1902] 1 Ch. 926; 71 L. J. Ch. 438; 86 L. T. 377; 50 W. R. 409 ...	16

	PAGE
Goldsmid <i>v.</i> Tunbridge Wells Improvement Commissioners (1865), L. R. 1 Eq. 161 ; 35 L. J. Ch. 88 ; 13 L. T. 332 ; 14 W. R. 92 ; affirmed, L. R. 1 Ch. App. 349 ; 35 L. J. Ch. 382 ; 14 L. T. 154 ; 14 W. R. 562 ; 12 Jur. (N.S.) 308 55, 57	
Goodday <i>v.</i> Michell (1595), Cro. Eliz. 441 159, 244	
Goodtitle <i>v.</i> Alker, 1 Burr. 133 178, 179	
— <i>v.</i> Southern (1813), 1 M. & S. 299 221	
Gourlay <i>v.</i> Somerset (Duke) (1812), 1 V. & B. 68 153	
Gower <i>v.</i> Eyre, Co. C. C. 156 151	
Grant <i>v.</i> Kearney (1823), 12 Price, 773... .. 159, 244	
Great Torrington Commons Conservators <i>v.</i> Stevens, [1904] 1 Ch. 347 ; 68 J. P. 111 ; 73 L. J. Ch. 124 ; 89 L. T. 667 ; 2 L. G. R. 397 : 41, 42, 242	
Great Western Rail. Co. <i>v.</i> Bennett (1867), L. R. 2 H. L. 27 ; 36 L. J. Q. B. 133 ; 16 L. T. 186 ; 15 W. R. 647 : 86	
— <i>v.</i> Carpalla United China Clay Co., Limited, [1909] 1 Ch. 218 ; 73 J. P. 23 ; 78 L. J. Ch. 105 ; 99 L. T. 869 ; 25 T. L. R. 91 [C. A.] 12	
— <i>v.</i> Cefn Cribbwr Brick Co., [1894] 2 Ch. 157 ; 63 L. J. Ch. 500 ; 70 L. T. 279 ; 42 W. R. 493 ; 8 R. 178 ... 76	
Green <i>v.</i> Duckett (1883), 11 Q. B. D. 275 ; 47 J. P. 487 ; 52 L. J. Q. B. 435 ; 48 L. T. 677 ; 31 W. R. 607 247	
Greenwich Board of Works <i>v.</i> Maudslay (1870), L. R. 5 Q. B. 397 ; 39 L. J. Q. B. 205 ; 23 L. T. 121 ; 18 W. R. 948 179	
Grierson <i>v.</i> Eyre (1802), 9 Ves. 345 260	
Griffiths <i>v.</i> Longdon and Eldersfield Drainage Board (1871), L. R. 6 Q. B. 738 ; 41 L. J. Q. B. 25 ; 25 L. T. 126 ; 19 W. R. 1162 : 67	
Grose <i>v.</i> West (1816), 7 Taunt. 39 182	
Groncott <i>v.</i> Williams (1863), 4 B. & S. 149 ; 32 L. J. Q. B. 237 ; 8 L. T. 458 110	
Guy <i>v.</i> West, 2 Selwyn N. P. 1244 94	
Gwyn <i>v.</i> Neath Canal Co. (1868), L. R. 3 Ex. 209 ; 37 L. J. Ex. 122 ; 18 L. T. 688 ; 16 W. R. 1209 219	

H.

Hadley <i>v.</i> Taylor (1865), L. R. 1 C. P. 53 ; 13 L. T. 368 ; 14 W. R. 59 ; 11 Jur. (N.S.) 979 110	
Hadwell <i>v.</i> Righton, [1907] 2 K. B. 345 ; 71 J. P. 499 ; 76 L. J. K. B. 891 ; 97 L. T. 133 ; 23 T. L. R. 548 ; 5 L. G. R. 881 ... 96	
Haigh <i>v.</i> West, [1893] 2 Q. B. 19 ; 62 L. J. Q. B. 532 ; 69 L. T. 165 ; 4 R. 396 184	
Hall <i>v.</i> Combes (1594), Cro. Eliz. 368 222	
— <i>v.</i> Lund (1863), 1 H. & C. 676 ; 32 L. J. Ex. 113 ; 7 L. T. 692 ; 11 W. R. 271 ; 9 Jur. (N.S.) 205 10	
Hamer <i>v.</i> Knowles (1861), 6 H. & N. 454 ; 30 L. J. Ex. 102 ; 3 L. T. 746 ; 9 W. R. 615 76	
Hammond <i>v.</i> Brodstreet (1854), 10 Ex. 390 ; 23 L. J. Ex. 332 ; 2 W. R. 625 ; 2 C. L. R. 1195 235, 236	
Hanbury <i>v.</i> Jenkins, [1901] 2 Ch. 401 ; 65 J. P. 631 ; 70 L. J. Ch. 730 ; 49 W. R. 615 60, 61	
Hardcastle <i>v.</i> South Yorkshire Rail. Co. (1859), 4 H. & N. 67 ; 28 L. J. Ex. 139 ; 32 L. T. (O.S.) 297 ; 7 W. R. 326 ; 5 Jur. (N.S.) 150 110—112	
Hargreaves <i>v.</i> Diddams (1875), L. R. 10 Q. B. 582 ; 44 L. J. M. C. 178 ; 32 L. T. 600 ; 23 W. R. 828 6, 41, 58, 59	

	PAGE
Harris v. De Pinna (1886), 33 Ch. D. 238; 50 J. P. 308; 56 L. J. Ch. 344; 54 L. T. 38 [C. A.]	9
—— v. Pepperell (1867), L. R. 5 Eq. 1; 16 W. R. 68	223
—— v. Ryding (1839), 8 L. J. Ex. 181; 5 M. & W. 60	71, 83
Harrison v. Rutland (Duke), [1893] 1 Q. B. 142; 62 L. J. Q. B. 117; 68 L. T. 35; 41 W. R. 322; 4 R. 155 [C. A.]	178, 179
Harrold v. Great Western Rail. Co. (1866), 14 L. T. 410	114
Harvey v. Truro Rural District Council (1903), 19 T. L. R. 576	177
Hastings Corporation v. Ivall (1874), L. R. 19 Eq. 558; 22 W. R. 724	234
Hawkins v. Wallis (1763), 2 Wils. 173	9
Hayward v. Cunnington (1668), 1 Lev. 231	12
Headlam v. Hedley (1816), Holt, N. P. 463	183
Heath v. Weaverham Township, [1894] 2 Q. B. 108; 58 J. P. 557; 63 L. J. M. C. 187; 70 L. T. 729; 42 W. R. 478; 10 R. 274	189
Henn's Case, Sir W. Jones, 297	185
Henneker v. Howard (1904), 90 L. T. 157	94
Hewlins v. Shippam (1826), 5 B. & C. 221; 4 L. J. (o.s.) K. B. 241; 7 Dow. & Ry. (K. B.) 783; 31 R. R. 757	7, 14
Hext v. Gill (1872), L. R. 7 Ch. App. 699; 41 L. J. Ch. 761; 27 L. T. 291; 20 W. R. 957	83, 84
Heywood v. Mallalien (1883), 25 Ch. D. 357; 53 L. J. Ch. 492; 49 L. T. 658; 32 W. R. 538	9
Hicks v. Hastings (1857), 3 K. & J. 701	256, 257
Hill v. Barclay (1810), 16 Ves. 402; 18 Ves. 56	153
Hilton v. Ankesson (1872), 27 L. T. 519	95
Hindson v. Ashby, [1896] 2 Ch. 1; 60 J. P. 484; 65 L. J. Ch. 515; 74 L. T. 327	37, 41, 42, 44, 58, 59, 61
Hoare v. Metropolitan Board of Works (1874), L. R. 9 Q. B. 296; 43 L. J. M. C. 65; 29 L. T. 804	9
Hobbs v. Groves, [1899] 1 Ch. 11; 68 L. J. Ch. 84; 79 L. T. 454	141
Hodges v. Lawrence (1854), 18 J. P. 347	179
Holbach v. Warner (1623), Cro. Jac. 665	100
Holder v. Coates (1827), M. & M. 112	204, 206, 207
Holford v. Bailey (1850), 13 Q. B. 426; 18 L. J. Q. B. 109; 13 Jur. 278	60, 61
Holker v. Porritt (1875), L. R. 10 Ex. 59; 44 L. J. Ex. 52; 33 L. T. 125; 23 W. R. 400	56
Hollins v. Verney (1884), 13 Q. B. D. 304; 48 J. P. 580; 53 L. J. Q. B. 430; 51 L. T. 753; 33 W. R. 5 [C. A.]	27
Hollis v. Goldfinch (1823), 1 B. & C. 205; 1 L. J. (o.s.) K. B. 91; 2 Dow. & Ry. 316; 25 R. R. 357	183
Holmes v. Bellingham, 7 C. B. (N.S.) 329; 29 L. J. C. P. 132; 6 Jur. (N.S.) 534	180, 181
—— v. Goring (1824), 2 Bing. 76; 9 Moo. C. P. 166	16
Homer v. Homer (1878), 8 Ch. D. 758; 47 L. J. Ch. 635; 39 L. T. 3; 27 W. R. 101	222
Hornby v. Silverster (1888), 20 Q. B. D. 797; 52 J. P. 468; 57 L. J. Q. B. 558; 59 L. T. 666; 36 W. R. 679 [C. A.]	195
Houghton v. Butler (1791), 4 T. R. 364	214
Hounsell v. Smyth (1860), 7 C. B. (N.S.) 731; 29 L. J. C. P. 203; 1 L. T. 440; 6 Jur. (N.S.) 897; 8 W. R. 277	110, 111
Howarth v. Armstrong (1897), 77 L. T. 62	17
Howton v. Frearson (1798), 8 T. R. 50	16
Hudson v. Tabor (1876), 1 Q. B. D. 225	63
Hughes v. Percival (1883), 8 App. Cas. 443; 47 J. P. 772; 52 L. J. Q. B. 719; 49 L. T. 189; 31 W. R. 725	145
Hulbert v. Dale, [1909] 2 Ch. 570; 101 L. T. 504	25

	PAGE
Hull and Selby Rail. Co., <i>In re</i> (1839), 5 M. & W. 327; 8 L. J. Ex. 260	36, 38, 44, 46, 47
Humphries <i>v.</i> Progden (1850), 12 Q. B. 739	70
Hunt <i>v.</i> Peake (1860), John. 705	76
Hutchinson <i>v.</i> Mains (1832), A. & N. 155	128

I.

Ilchester (Earl of) <i>v.</i> Rashleigh (1889), 61 L. T. 477	29
International Tea Stores Co. <i>v.</i> Hobb, [1903] 2 Ch. 165; 72 L. J. Ch. 543; 88 L. T. 725; 51 W. R. 615... ..	6, 26
Ipswich Dock Commissioners <i>v.</i> Overseers of St. Peter's, 7 B. & S. 310	39
Ipswich Docks <i>v.</i> St. Peter's (1866), 7 B. & S. 310	159
Ireland <i>v.</i> Powell, cited in 7 A. & E. 550, at p. 559	229
Irwin <i>v.</i> Simpson (1758), 7 Bro. P. C. 317; Bull. N. P. 247	245
Isle of Ely Case (1839), 10 Co. Rep. 141a	63
Ives <i>v.</i> Wright, 2 Roll. Abr. 312	158

J.

Jack <i>v.</i> Macintyre (1845), 12 C. & F. 151	221
Jacobs <i>v.</i> Seward (1869), L. R. 4 C. P. 328; (1872) L. R. 5 H. L. 464; 41 L. J. C. P. 221; 27 L. T. 185	131, 250
James <i>v.</i> Dods (1834), 2 Cr. & M. 266; 3 L. J. Ex. 47; 4 Tyr. 101: 16	
Jary <i>v.</i> Barnsley Corporation, [1907] 2 Ch. 600; 71 J. P. 468; 76 L. J. Ch. 593; 97 L. T. 507; 23 T. L. R. 689; 5 L. G. R. 1145	86, 91
Jenny <i>v.</i> Brook (1844), 6 Q. B. 323; 13 L. J. Q. B. 375; 8 Jur. 782	191
John Young & Co. <i>v.</i> Bankier Distillery Co., [1893] A. C. 691; 58 J. P. 100; 69 L. T. 838	55
Johnson <i>v.</i> Barnes (1873), L. R. 8 C. P. 527; 42 L. J. C. P. 259; 69 L. T. 65	11
Johnston <i>v.</i> O'Neill, [1911] A. C. 552; 81 L. J. P. C. 17; 105 L. T. 587; 27 T. L. R. 545; 55 Sol. J. 686	41, 49, 58
Jones <i>v.</i> Bird (1822), 5 B. & Ald. 837; 1 D. & R. 497	130
— <i>v.</i> Pritchard, [1908] 1 Ch. 630; 77 L. J. Ch. 405; 98 L. T. 386; 24 T. L. R. 309... ..	78, 130
— <i>v.</i> Williams (1843), 11 M. & W. 176; 12 L. J. Ex. 249	213
Jordeson <i>v.</i> Sutton, etc. Gas. Co., [1899] 2 Ch. 217; 63 J. P. 692: 68 L. J. Ch. 457; 80 L. T. 815; 15 T. L. R. 374: 69, 75, 76, 82, 123	

K.

Keane <i>v.</i> Reynolds (1853), 2 E. & B. 748; 18 Jur. 242	192
Kempston <i>v.</i> Butler (1861), 12 Ir. C. L. R. 516	128
Kensit <i>v.</i> Great Eastern Rail. Co. (1883), 23 Ch. D. 566; (1884), 27 Ch. D. 122; 54 L. J. Ch. 19; 51 L. T. 862; 32 W. R. 885 [C.A.]	52, 53, 57
Keppell <i>v.</i> Bailey (1833), 2 M. & K. 517; Coop. t. Brough. 298	8

	PAGE
Keyse v. Powell (1853), 2 E. & B. 132; 22 L. J. Q. B. 305; 17 Jur. 1052 ...	3
Kilgour v. Gaddes, [1904] 1 K. B. 457; 73 L. J. K. B. 233; 90 L. T. 604; 52 W. R. 438; 20 T. L. R. 240 [C. A.] ...	27
Kingston-upon-Hull Corporation v. Horner (1774), 1 Cowp. 102; Lofft. 576 ...	18
Knight v. Pursell (1879), 11 Ch. D. 412; 48 L. J. Ch. 395; 40 L. T. 391; 27 W. R. 817 ...	134
Knowles v. Lancashire and Yorkshire Rail. Co. (1887), 20 Q. B. D. 391; (1889) 14 App. Cas. 248; 61 L. T. 91 ...	89

L.

Lamb v. Walker (1878), 3 Q. B. D. 389; 45 L. J. Q. B. 451; 38 L. T. 643; 26 W. R. 775 ...	74
Lambe v. Reaston (1813), 5 Taunt. 207 ...	220
Lane v. Capsey, [1891] 3 Ch. 411; 65 L. T. 375 ...	213
— v. Dixon (1847), 3 C. B. 776; 16 L. J. C. P. 129; 11 Jur. 89 ...	9
Lancashire Telephone Co. v. Manchester Overseers (1884), 14 Q. B. D. 267; 49 J. P. 724; 54 L. J. M. C. 63; 52 L. T. 793; 33 W. R. 203 [C. A.] ...	9
Lancaster v. Eve (1859), 5 C. B. (N.S.) 707 ...	10
Lawrence v. Jenkins (1873), L. R. 8 Q. B. 274; 42 L. J. Q. B. 147; 28 L. T. 406; 21 W. R. 577 ...	97, 104
Laybourne v. Gridley, [1892] 2 Ch. 53; 61 L. J. Ch. 352; 40 W. R. 474 ...	136
Lee v. Alston (1779), 1 Bro. C. C. 196; 3 Bro. C. C. 37 ...	151
— v. Johnstone, 1 L. R. Sc. Ap. 426 ...	231
— v. Riley (1865), 13 W. R. 751 ...	96
Leeds (Duke) v. Stratford (Earl) (1798), 4 Ves. jun. 180 ...	149, 259
Leadbitter v. Marylebone Corporation, [1904] 2 K. B. 893; 68 J. P. 566; 73 L. J. K. B. 1013; 91 L. T. 639; 53 W. R. 118; 20 T. L. R. 778 [C. A.]; [1905] 1 K. B. 661; 69 J. P. 201; 74 L. J. K. B. 507; 92 L. T. 819; 53 W. R. 470; 21 T. L. R. 377 [C. A.] ...	141—143
Leigh v. Dickeson (1883), 12 Q. B. D. 194; (1884), 15 Q. B. D. 60; 54 L. J. Q. B. 18; 52 L. T. 790; 33 W. R. 538 ...	131
— v. Jack (1879), 5 Ex. D. 264; 44 J. P. 488; 49 L. J. Ex. 220; 42 L. T. 463; 28 W. R. 452 [C. A.] ...	20, 182, 186
Lemaître v. Davis (1881), 19 Ch. D. 281; 46 J. P. 324; 51 L. J. Ch. 173; 46 L. T. 407; 30 W. R. 360 ...	78, 81, 129
Lemmon v. Webb, [1894] 3 Ch. 1; [1895] A. C. 1; 59 J. P. 564; 64 L. J. Ch. 205; 71 L. T. 647 ...	9, 204, 208—212
Lewis Bowles' Case (1615), 11 Rep. 79 b. ...	151
— v. Branthwaite (1831), 2 B. & Ad. 437; 9 L. J. (o.s.) K. B. 263 ...	3
— v. Charing Cross, Euston and Hampstead Rail. Co., [1906] 1 Ch. 508; 70 J. P. 221; 75 L. J. Ch. 282; 94 L. T. 732; 54 W. R. 435; 22 T. L. R. 282; 4 L. G. R. 432 ...	137
— v. Marsh (1849), 8 Hare, 97 ...	125
— v. Price (1761), 2 Wms. S. 175 ...	23
Llandudno Urban Council v. Woods, [1899] 2 Ch. 705; 63 J. P. 775; 68 L. J. Ch. 623; 81 L. T. 170; 48 W. R. 43 ...	32
Llewellyn v. Jersey (Earl of) (1843), 11 M. & W. 183; 12 L. J. Ex. 243 ...	220, 221

	PAGE
Liverpool and North Wales Steamship Co., Limited <i>v.</i> Mersey Trading Co., Limited, [1909] 1 Ch. 209; 73 J. P. 19; 78 L. J. Ch. 17; 99 L. T. 863; 25 T. L. R. 89 [C. A.]	31
Locke-King <i>v.</i> Woking Urban District Council (1898), 62 J. P. 167; 77 L. T. 790	177
Lockwood <i>v.</i> Wood (1844), 6 Q. B. 50	27
Lomax <i>v.</i> Stott (1870), 39 L. J. Ch. 834	121
London and North Western Rail. Co. <i>v.</i> Ackroyd (1862), 31 L. J. Ch. 588; 8 Jur. (N.S.) 911; 10 W. R. 367	88
London and North Western Rail. Co. <i>v.</i> Evans, [1893] 1 Ch. 16; 62 L. J. Ch. 1; 67 L. T. 630; 41 W. R. 149	82
London and North Western Rail. Co. <i>v.</i> Howley Park Coal Co., [1911] 2 Ch. 97; 80 L. J. Ch. 537	85
London and North Western Rail. Co. <i>v.</i> Westminster Corporation, [1902] 1 Ch. 269; [1905] A. C. 426; 69 J. P. 425; 72 L. J. Ch. 629; 93 L. T. 143; 54 W. R. 129; 21 T. L. R. 686; 3 L. G. R. 1120	179, 180
London Corporation <i>v.</i> Riggs (1880), 13 Ch. D. 798; 44 J. P. 345; 49 L. J. Ch. 297; 42 L. T. 580; 28 W. R. 610	16
London, Gloucestershire and North Hants Dairy Co. <i>v.</i> Morley, [1911] 2 K. B. 257; 75 J. P. 437; 80 L. J. K. B. 908; 104 L. T. 773; 9 L. G. R. 738	134, 137
Long <i>v.</i> Collier (1828), 4 Russ. 276	245
Lonsdale <i>v.</i> Curwen (1799), 3 Bli. (o.s.) 168	125
Lonsdale (Earl of) <i>v.</i> Nelson (1823), 2 B. & C. 311; 3 D. & R. 556	211, 212
Lord Advocate <i>v.</i> Wemyss, [1900] A. C. 48	29
—— <i>v.</i> Young (1887), 12 App. Cas. 544	34
Lousley <i>v.</i> Hayward, 1 Yo. & Jer. 586	156
Lovat <i>v.</i> Ranelagh (Lord) (1814), 3 V. & B. 29	153
Love <i>v.</i> Bell (1884), 9 App. Cas. 286; 48 J. P. 516; 53 L. J. Q. B. 257; 51 L. T. 1; 32 W. R. 725	70
Lowe <i>v.</i> Adams, [1901] 2 Ch. 598; 70 L. J. Ch. 783; 85 L. T. 195; 50 W. R. 37; 17 T. L. R. 763	13
—— <i>v.</i> Govett (1832), 1 L. J. K. B. 224; 3 B. & Ad. 863	29
Lowen <i>v.</i> Kaye (1824), 4 B. & C. 3; 6 D. & R. 20	192
Lumb <i>v.</i> Beaumont (1884), 27 Ch. D. 356; 53 L. J. Ch. 1111; 51 L. T. 197; 32 W. R. 985	125
Lyon <i>v.</i> Fishmongers Co. (1875), L. R. 10 Ch. App. 679	40
—— <i>v.</i> ——— (1876), 1 App. Cas. 662; 46 L. J. Ch. 68; 35 L. T. 569; 25 W. R. 165 [H. L.]	50, 51
Lyttelton Times Co., Limited <i>v.</i> Warners, Limited, [1907] A. C. 476; 76 L. J. P. C. 100; 97 L. T. 496; 23 T. L. R. 751 [P. C.]	11

M.

Mackenzie <i>v.</i> Bankes (1878), 3 App. Cas. 1324	49
Magdalen College <i>v.</i> Athill, Mitford Eq. Pl. 183	258
Major <i>v.</i> Park Lane Co. (1866), L. R. 2 Eq. 453; 14 L. T. 543	141, 147
Malcomson <i>v.</i> O'Dea (1863), 9 L. T. 93; 12 W. R. 178; 10 H. L. C. 593; 9 Jur. (N.S.) 1135	60, 61
Manchester and Sheffield Rail. Co. <i>v.</i> Wallis (1854), 14 C. B. 213	115
Manchester Corporation <i>v.</i> New Moss Colliery, Limited, [1906] 1 Ch. 278; 70 J. P. 83; 75 L. J. Ch. 145; 93 L. T. 762; 54 W. R. 240; 22 T. L. R. 132; 4 L. G. R. 66	76
Manning <i>v.</i> Fitzgerald (1859), 29 L. J. Ex. 24	220, 221

TABLE OF CASES.

xxix

	PAGE
Manning v. Wasdale (1836), 5 A. & E. 758; 1 Nev. & P. (K. B.) 172	7
Mappin Brothers v. Liberty & Co., Limited, [1903] 1 Ch. 118; 72 L. J. Ch. 63; 87 L. T. 523; 51 W. R. 264	179, 180
Marshall v. Berridge (1881), 19 Ch. D. 233; 46 J. P. 279; 51 L. J. Ch. 329; 45 L. T. 599; 30 W. R. 93 [C. A.]	222
—— v. Taylor, [1895] 1 Ch. 641; 64 L. J. Ch. 416; 72 L. T. 670	20, 94
—— v. Ulleswater Co. (1871), L. R. 7 Q. B. 166; 41 L. J. Q. B. 41; 25 L. T. 793; 20 W. R. 144	49
—— v. Ulleswater Steam Navigation Co. (1863), 3 B. & S. 732; 32 L. J. Q. B. 139; 8 L. T. 416; 11 W. R. 489; 9 Jur. (N.S.) 988	49, 61
Martyn v. Knollys (1799), 8 T. R. 145	132
Mason v. Fulham Corporation, [1910] 1 K. B. 631; 74 J. P. 170; 79 L. J. K. B. 385; 102 L. T. 188; 8 L. G. R. 415	147
—— v. Hill (1833), 2 L. J. K. B. 118; 5 B. & Ad. 1; 2 Nev. & M. 747	52, 55
—— v. Shrewsbury and Hereford Rail. Co. (1871), L. R. 6 Q. B. 578; 40 L. J. Q. B. 293; 25 L. T. 239; 20 W. R. 14	56
Massey v. Goyder (1829), 4 C. & P. 161	129
Masters v. Pollie (1620), 2 Rolle, 141, 207	204—206
Matts v. Hawkins (1813), 5 Taunt. 20	95, 127, 128, 131
Maxwell v. Martin (1830), 6 Bing. 522	12
May v. Platt, [1900] 1 Ch. 616; 69 L. J. Ch. 357; 83 L. T. 123; 48 W. R. 617	223
Mayfair Property Co. v. Johnston, [1894] 1 Ch. 508; 63 L. J. Ch. 399; 70 L. T. 485	95, 133, 138, 250, 251
M'Bryde, <i>Ex parte</i> (1876), 4 Ch. D. 200; 46 L. J. Ch. 153; 35 L. T. 543	143
McCannon v. Sinclair (1859), 5 Jur. (N.S.) 1022	38
McCartney v. Londonderry Rail. Co., [1904] A. C. 301; 73 L. J. P. C. 73; 91 L. T. 105; 53 W. R. 385	52, 53
McIntyre Brothers v. McGavin, [1893] A. C. 268; 57 J. P. 548; 69 L. T. 389; 1 R. 246	10
McManus v. Cooke (1887), 35 Ch. D. 681; 51 J. P. 708; 56 L. J. Ch. 662; 56 L. T. 900; 35 W. R. 754	14
Mellor v. Walmesley, [1905] 2 Ch. 164; 74 L. J. Ch. 475; 93 L. T. 574; 53 W. R. 581; 21 T. L. R. 591	29, 30, 36, 48
Menzies v. Breadalbane (1901), 4 F. (Ct. of Sess.)	41
Mercer v. Denne, [1904] 2 Ch. 534; 68 J. P. 479; 91 L. T. 513; 53 W. R. 55; 20 T. L. R. 609; affirmed, [1905] 2 Ch. 538; 70 J. P. 65; 93 L. T. 412; 54 W. R. 303; 21 T. L. R. 760; 3 L. G. R. 1293 [C. A.]	7, 37, 226
—— v. Woodgate (1869), L. R. 5 Q. B. 26; 39 L. J. M. C. 21; 21 L. T. 458; 18 W. R. 116	185, 186
Metcalfe v. Beckwith (1726), 2 P. Wms. 376	254
Metropolitan Board of Works v. Metropolitan Rail. Co. (1869), L. R. 4 C. P. 192; 38 L. J. C. P. 172; 19 L. T. 744; 17 W. R. 416	83, 90
Metropolitan Rail. Co. v. Fowler, [1892] 1 Q. B. 165	7
Micklethwaite v. Newlay Bridge Co. (1886), 33 Ch. D. 133; 51 J. P. 132; 53 L. T. 336	42, 180, 181
Midland Rail. Co. v. Daykin (1855), 17 C. B. 129; 25 L. J. C. P. 73	115
—— v. Wright, [1901] 1 Ch. 738; 70 L. J. Ch. 411; 84 L. T. 225; 49 W. R. 474; 17 T. L. R. 261	3
Miller v. Fandrye (1592), Poph. 163	215

	PAGE
Miller v. Hancock, [1893] 2 Q. B. 177; 57 J. P. 758; 69 L. T. 214; 41 W. R. 578...	16
—— v. Travers (1832), 8 Bing. 244 ...	222
—— v. Warmington (1820), 1 Jac. & W. 484 ...	255
Miner v. Gilmour (1858), 12 Moo. 131 ...	52
Minturn v. Barry, [1911] 2 K. B. 265; 75 J. P. 330; 80 L. J. K. B. 802; 104 L. T. 635; 27 T. L. R. 352; 55 Sol. J. 385; 9 L. G. R. 611 ...	139
Mitchell v. Darley Main Colliery Co. (1883), 10 Q. B. D. 457; 52 L. J. Q. B. 394; 31 W. R. 549 ...	126
Moody v. Steggles (1879), 12 Ch. D. 261; 48 L. J. Ch. 639; 41 L. T. 25 ...	9
Moore v. Rawson (1824), 3 B. & C. 332; 3 L. J. (o.s.) K. B. 32; 5 Dow. & Ry. (K. B.) 234 ...	27
Morgan v. Leach (1842), 12 L. J. M. C. 4; 10 M. & W. 558; 2 Dowl. (N.S.) 522 ...	118
Morrell v. Fisher (1849), 4 Ex. 591 ...	220
Mounsey v. Ismay (1865), 34 L. J. Ex. 52; 12 L. T. 27; 13 W. R. 521; 3 H. & C. 486; 11 Jur. (N.S.) 141 ...	7
Mullineux v. Mullineux (1616), Toth. 39 ...	259
Mundy v. Rutland (Duke) (1883), 23 Ch. D. 81; 31 W. R. 510 ...	72, 121, 123
Murchie v. Black (1865), 19 C. B. (N.S.) 190; 34 L. J. C. P. 337; 12 L. T. 735; 11 Jur. (N.S.) 608 ...	80, 129
Murly v. McDermott (1838), 8 A. & E. 138; 3 N. & P. 356...	131, 133
Murphy v. Ryan (1868), 1 R. 2 C. L. 143 ...	6, 59
Murray v. Hall (1849), 7 C. B. 441; 18 L. J. C. P. 161 ...	132
Myers v. Catterson (1889), 43 Ch. D. 470; 59 L. J. Ch. 315; 62 L. T. 205; 38 W. R. 488 ...	15, 79

N.

Neaverson v. Peterborough Rural District Council, [1902] 1 Ch. 557; 66 J. P. 404; 71 L. J. Ch. 378; 86 L. T. 739; 50 W. R. 549; 18 T. L. R. 360 [C. A.] ...	23
Neeld v. Hendon Urban District Council (1899), 63 J. P. 724; 81 L. T. 406 ...	177, 178
Nelson v. Liverpool Brewery Co. (1877), 2 C. P. D. 311; 46 L. J. C. P. 675; 25 W. R. 877 ...	150
Newcastle (Duke) v. Broxtowe Hundred, 4 B. & Ad. 273; 1 Nev. & M. (K. B.) 598 ...	226, 228
—— v. Clark (1813), 8 Taunt. 602 ...	65, 128
New Moss Colliery Co., Limited v. Manchester Corporation, [1908] A. C. 117; 72 J. P. 169; 77 L. J. Ch. 392; 98 L. T. 467; 24 T. L. R. 386; 52 Sol. J. 334; 6 L. G. R. 809 ...	70
New Romney Corporation v. Commissioners of Sewers of New Romney, [1892] 1 Q. B. 840; 56 J. P. 756; 61 L. J. Q. B. 558 [C. A.] ...	238
Nicklin v. Williams (1854), 23 L. J. Ex. 335; 10 Ex. 259 ...	72
Nichol v. Beaumont (1883), 50 L. T. 112 ...	177
Nicholls v. Parker, 14 East, 331...	227
Norbury v. Kitchen (1866), 18 L. T. (N.S.) 501; 3 F. & F. 292 ...	53
Norfolk (Duke) v. Arbutnot (1880), 5 C. P. D. 390; 44 J. P. 796; 49 L. J. C. P. 782; 43 L. T. 302 ...	22
Norris v. Baker (1616), 1 Rolle, 394; 2 Buls. 198; Viner, Abr., Trees E. ...	210
North Eastern Rail. Co. v. Elliott (1860), 1 J. & H. 145 ...	79

TABLE OF CASES.

xxxi

	PAGE
Northam v. Hurley (1853), 1 E. & B. 665; 22 L. J. Q. B. 183; 17 Jur. 672	15
Nowel v. Smith (1598), Cro. Eliz. 709	100, 103, 108, 109
Noy v. Reed (1827), 1 M. & R. (K. B.) 63	94, 132
Nuttall v. Braeewell (1866), L. R. 2 Ex. 1; 36 L. J. Ex. 1; 15 L. T. 313; 4 H. & C. 714; 12 Jur. (N.S.) 989	50, 58

O.

Offin v. Rochford Rural District Council, [1906] 1 Ch. 342; 70 J. P. 97; 75 L. J. Ch. 348; 94 L. T. 669; 54 W. R. 244; 4 L. G. R. 595	177
Ogston v. Stewart, [1896] A. C. 120	62
Onley v. Gardiner (1838), 4 M. & W. 496; 1 Horn & H. 381	25
Original Hartlepool Collieries Co. v. Gibb (1877), 5 Ch. D. 713; 46 L. J. Ch. 311; 36 L. T. 433	6
Orr Ewing v. Colquhoun (1877), 2 App. Cas. 839	41, 43

P.

Palk v. Skinner (1852), 18 Q. B. 568; 22 L. J. Q. B. 27; 17 Jur. 372	25
Palmer v. Fletcher (1663), 1 Lev. 122	15, 76
Parker v. Gerard, Amb. 236	133
Partridge v. Scott (1838), 3 M. & W. 220; 1 Horn. & H. 31; 7 L. J. Ex. 101	76, 208
Patrick v. Colericke (1838), 3 M. & W. 483; 7 L. J. Ex. 135	215
Payne v. Rogers, 2 H. Bla. 348	150
Pearson v. Spencer (1863), 3 B. & S. 761; 8 L. T. 166; 11 W. R. 471	14, 16
Peckering v. Kimpton (1653), 5 Car. 2; Toth. 101	259
Penruddock's Case (1598), 5 Rep. 100	212, 213
Perry v. Fitzhowe (1846), 8 Q. B. 757; 15 L. J. Q. B. 239; 10 Jur. 799	212
Peter v. Daniel (1858), 5 C. B. 568; 5 D. & L. 501; 17 L. J. C. P. 177; 12 Jur. 604	10
Peyton v. London (Corporation) (1829), 9 B. & C. 725; 4 Man. & R. (K. B.) 625	76, 129
Pheysey v. Vicary (1847), 16 M. & W. 484	14
Phillips v. Halliday, [1891] A. C. 228; 55 J. P. 741; 61 L. J. Q. B. 210; 64 L. T. 745... ..	18
—— v. Hudson (1867), 2 Ch. App. 243; 36 L. J. Ch. 301; 16 L. T. 221; 15 W. R. 370	235, 239, 258
—— v. Low, [1892] 1 Ch. 47; 61 L. J. Ch. 44; 65 L. T. 552	14
Phillipson v. Gibbon (1871), L. R. 6 Ch. App. 428; 40 L. J. Ch. 406; 24 L. T. 602; 19 W. R. 661... ..	133
Philpot v. Bath, [1905] W. N. 114	20, 35
Pinnington v. Galland (1853), 9 Ex. 1; 22 L. J. Ex. 348	15, 16
Pipe v. Fulcher (1858), 1 E. & E. 111; 28 L. J. Q. B. 12; 5 Jur. (N.S.) 146	235
Plasterers' Co. v. Parish Clerks' Co. (1857), 6 Ex. 630; 20 L. J. Ex. 362; 15 Jur. 965	26
Plaxton v. Dare (1829), 10 B. & C. 17; 5 M. & R. 1... ..	232, 243
Plumbley v. Lock (1903), 19 T. L. R. 14	184

	PAGE
Plumstead Board of Works <i>v.</i> British Land Co. (1874), L. R. 10 Q. B. 16; (1875), L. R. 10 Q. B. 203; 44 L. J. Q. B. 38; 32 L. T. 94; 23 W. R. 634	42
Polsue and Alfieri, Limited <i>v.</i> Rushmer, [1907] A. C. 121; 76 L. J. Ch. 365; 96 L. T. 510	4
Pomfret <i>v.</i> Ricroft (1669), 1 Wms. S. 321; 2 Keb. 505	16, 186
Ponting <i>v.</i> Noakes, [1894] 2 Q. B. 281; 58 J. P. 559; 63 L. J. Q. B. 549; 70 L. T. 842; 42 W. R. 506; 10 R. 265	210
Poole <i>v.</i> Huskinson (1843), 11 M. & W. 827	179, 196
Popplewell <i>v.</i> Hodgkinson (1869), L. R. 4 Ex. 248; 38 L. J. Ex. 126; 20 L. T. 578; 17 W. R. 806	75, 122
Portman <i>v.</i> Mill (1839), 8 L. J. Ch. 161; 3 Jur. 356	220
Potter <i>v.</i> Parry (1859), 7 W. R. 182	115, 196
Powley <i>v.</i> Walker (1793), 5 T. R. 373	151
Prinsep <i>v.</i> Belgravian Estate, Limited, [1896] W. N. 39	14
Procter <i>v.</i> Hodgson (1855), 10 Ex. 824; 24 L. J. Ex. 195	16
Proud <i>v.</i> Bates (1865), 34 L. J. Ch. 406; 13 L. T. 61; 11 Jur. (N.S.) 441	123
Pryor <i>v.</i> Petre, [1894] 2 Ch. 11; 63 L. J. Ch. 531; 70 L. T. 331; 42 W. R. 435	181
Pye <i>v.</i> Mumford (1848), 11 Q. B. 666; 17 L. J. Q. B. 138; 5 Dow. & L. 414	9

Q.

Queen (The) <i>v.</i> Keyn (1876), 2 Ex. D. 63; 46 L. J. M. C. 17; 13 Cox C. C. 403	29
--	----

R.

Race <i>v.</i> Ward (1855), 4 El. & Bl. 702; 34 L. J. Q. B. 396; 1 Jur. (N.S.) 704	7, 9, 12, 75
Rains <i>v.</i> Buxton (1880), 14 Ch. D. 537; 49 L. J. Ch. 473; 43 L. T. 88; 28 W. R. 954	20
Ramshur <i>v.</i> Koonj (1878), 4 App. Cas. 121	57
Rand <i>v.</i> Green (1860), 9 C. B. (N.S.) 477	221
Rangeley <i>v.</i> Midland Rail. Co. (1868), L. R. 3 Ch. App. 306; 37 L. J. Ch. 313; 18 L. T. 69; 16 W. R. 547	8
Ray <i>v.</i> Hazeldine, [1904] 2 Ch. 17; 73 L. J. Ch. 537; 90 L. T. 703; 64	17
Reece <i>v.</i> Miller (1882), 8 Q. B. D. 626; 47 J. P. 37; 51 L. J. M. C. 64	40
Reed <i>v.</i> Jackson (1801), 1 East, 355	230, 231
R. <i>v.</i> Barker (1890), 25 Q. B. D. 213; 36 L. J. Q. B. 242; 15 W. R. 1144	189
— <i>v.</i> Bedfordshire (Inhabitants) (1855), 4 E. & B. 535; 24 L. J. Q. B. 81; 3 C. L. R. 542; 1 Jur. (N.S.) 208	226
— <i>v.</i> Berger, [1894] 1 Q. B. 823; 58 J. P. 416; 63 L. J. Q. B. 529; 70 L. T. 807; 42 W. R. 541; 10 R. 245; 17 Cox C. C. 761; 229, 235, 237	
— <i>v.</i> Bliss (1837), 7 L. J. Q. B. 4; 7 A. & E. 550; Will. Woll. & Dav. 624; 2 Nev. & P. (K. B.) 464	229
— <i>v.</i> Board of Works for Strand (1863), 4 B. & S. 526	158

	PAGE
<i>R. v. Bristol Dock Co.</i> , 6 B. & C. 181; 5 L. J. (o.s.) M. C. 51; 9 Dow. & Ry. (K. B.) 309; 30 R. R. 280	64
— <i>v. Chorley</i> (1848), 12 Q. B. 515; 12 Jur. 822	27
— <i>v. Commissioners of Fobbing Levels</i> (1885), 14 Q. B. D. 561; 11 App. Cas. 449... ..	63
— <i>v. Commissioners of Somerset</i> , 8 T. R. 312... ..	63
— <i>v. Cotton</i> (1813), 3 Campb. 444	226
— <i>v. Edmonton</i> (1831), 1 Moo. & R. 32	196
— <i>v. Exeter Governors</i> (1869), L. R. 4 Q. B. 341; 38 L. J. M. C. 126; 20 L. T. 693; 17 W. R. 850	243
— <i>v. Flecknow</i> , 1 Burr. 461	186
— <i>v. Gee</i> , 28 L. J. Q. B. 298; 1 E. & E. 1068; 5 Jur. (N.S.) 1348; 7 W. R. 528	38
— <i>v. Hardy</i> (1868), L. R. 4 Q. B. 117; 38 L. J. Q. B. 9; 19 L. T. 352; 17 W. R. 173; 9 B. & S. 926	165
— <i>v. Hatfield</i> (1835), 4 A. & E. 164	196
— <i>v. Hickling</i> (1845), 7 Q. B. 880; 14 L. J. M. C. 177; 9 Jur. 1075; 2 New Sess. Cas. 117	176
— <i>v. Hobson</i> (1850), 19 L. J. Q. B. 262	162
— <i>v. Inhabitants of Westham</i> , 10 Mod. 159	63
— <i>v. Johnson</i> (1859), 1 F. & F. 657	193
— <i>v. Lancashire</i> (1818), 1 B. & Ald. 630	171
— <i>v. Landulph</i> (1834), 1 Moo. & R. 393	158
— <i>v. Lepille</i> , 15 L. T. 158; 15 W. R. 45	192
— <i>v. Matthias</i> (1861), 2 F. & F. 570	179
— <i>v. Milton</i> (1843), 1 C. & K. 58	235, 236
— <i>v. Musson</i> , 8 E. & B. 900; 27 L. J. M. C. 100; 6 W. R. 246; 4 Jur. (N.S.) 111	38
— <i>v. Mytton</i> (1860), 2 E. & E. 557; 29 L. J. M. C. 109; 2 L. T. 12; 8 W. R. 275; 6 Jur. (N.S.) 341	228
— <i>v. Northowram</i> (Ratepayers) (1865), L. R. 1 Q. B. 110	165
— <i>v. Pagham Level Commissioners</i> (1828), 8 B. & C. 774	121
— <i>v. Pedley</i> (1834), 1 A. & E. 822; 3 N. & M. 627	150
— <i>v. Ramsden</i> , E. B. & E. 949; 27 L. J. M. C. 296; 5 Jur. (N.S.) 169... ..	186
— <i>v. Rosewell</i> (1699), Salk. 459	212
— <i>v. St. Pancras Assessment Committee</i> (1877), 2 Q. B. D. 581; 46 L. J. M. C. 243; 37 L. T. 126; 25 W. R. 827	9
— <i>v. Skinner</i> , 5 Esp. 219; 2 Wms. Saund. 160a	186
— <i>v. Tombleson</i> (1863), 27 J. P. 150	158
— <i>v. United Kingdom E. T. Co.</i> (1862), 8 Jur. (N.S.) 1153	177, 193
— <i>v. Warton</i> , 2 B. & S. 719; 31 L. J. Q. B. 265; 9 Jur. (N.S.) 325... ..	64
— <i>v. Washbrook</i> (1825), 4 B. & C. 732; 7 Dow. & Ry. (K. B.) 221... ..	171, 176
— <i>v. Watson</i> (1868), L. R. 3 Q. B. 762	156
— <i>v. Wright</i> (1832), 1 L. J. M. C. 74; 3 B. & Ad. 681	177, 193
— <i>v. Yarborough</i> (1824), 3 B. & C. 91; 5 Bing. 163; 2 Bli. (N.S.) 147; 1 Dow. & C. 178	44, 46, 47
— <i>v. Yarborough</i> (1828), 2 Bli. (N.S.) 147	37
<i>Richards v. Morgan</i> (1863), 4 B. & S. 641; 33 L. J. Q. B. 114; 9 L. T. 662; 12 W. R. 162; 10 Jur. (N.S.) 559	243
— <i>v. Rose</i> (1853), 9 Ex. 218; 23 L. J. Ex. 3; 2 C. L. R. 311: 17, 78, 79, 129	
<i>Rickett v. Metropolitan Rail. Co.</i> (1867), 5 B. & S. 156; 34 L. J. Q. B. 257; 12 L. T. 75; 13 W. R. 455; 11 Jur. (N.S.) 260	214

	PAGE
<i>Ricketts v. East and West India Docks Rail. Co.</i> (1852), 12 C. B. 160; 21 L. J. P. C. 201; 16 Jur. 1072; 7 Ry. & Can. Cas. 295; 114, 115, 249	
<i>Rickman v. Carstairs</i> (1833), 5 B. & Ad. 651; 3 L. J. K. B. 28; 2 Nev. & M. 562 219	
<i>Rider v. Smith</i> (1790), 3 T. R. 766 108, 109	
<i>Rigby v. Bennett</i> (1882), 21 Ch. D. 559; 47 J. P. 217; 40 L. T. 47; 31 W. R. 222 [C. A.] 78, 79	
<i>Right v. Bayard</i> (1674), 1 Freem. K. B. 379 249	
<i>Roberts v. James</i> (1903), 89 L. T. 282 23	
<i>Robins v. Jones</i> (1863), 15 C. B. (N.S.) 221; 33 L. J. C. P. 1; 9 L. T. 523; 12 W. R. 248; 10 Jur. (N.S.) 239 112	
<i>Rochdale Canal Co. v. King</i> (1849), 14 Q. B. 122; 18 L. J. Q. B. 293; 14 Jur. 16 23	
————— <i>v. Radcliffe</i> (1852), 18 Q. B. 287; 21 L. J. Q. B. 297; 16 Jur. 1111 23, 27	
<i>Roe v. Lidwell</i> (1860), 9 Ir. C. L. R. 184 221	
<i>Rogers v. Allen</i> (1808), 1 Camp. 309 233	
————— <i>v. Taylor</i> (1851), 1 H. & N. 706; 26 L. J. Ex. 203 9	
————— <i>v. Wood</i> (1831), 2 B. & Ad. 245 226	
<i>Rolle v. Whyte</i> (1868), L. R. 3 Q. B. 286; 8 B. & S. 116; 37 L. J. Q. B. 105; 17 L. T. 560; 16 W. R. 593 10	
<i>Rooth v. Wilson</i> (1817), 1 B. & Ald. 59; 18 R. R. 431 107	
<i>Rorke v. Errington</i> (1859), 7 H. L. C. 617; 5 Jur. (N.S.) 1227 220	
<i>Rosewell v. Prior</i> (1702), 2 Salk. 460; 1 Ld. Raym. 713 150	
<i>Rous v. Barker</i> (1725), 4 Bro. P. C. 660 259, 261	
<i>Rowbotham v. Wilson</i> (1857), 8 E. & B. 123; 27 L. J. Q. B. 61; 5 W. R. 820 14, 70, 72, 78, 83	
<i>Royal Mail Steam Packet Co. v. George</i> , [1900] A. C. 480; 69 L. J. P. C. 107; 82 L. T. 539 9	
<i>Russell v. Shenton</i> (1842), 3 Q. B. 449; 11 L. J. Q. B. 289; 6 Jur. 1059; 2 Gal. & Dav. 573 150	
————— <i>v. Watts</i> (1885), 10 App. Cas. 590; 50 J. P. 68; 55 L. J. Ch. 158; 53 L. T. 876; 34 W. R. 277 14, 15	
<i>Rylands v. Fletcher</i> (1868), L. R. 3 H. L. 330; 37 L. J. Ex. 161; 19 L. T. 220 5, 120	

S.

<i>Sackville v. Milward</i> (1444), Vin. Abr. tit. Fences D. 4 249	
<i>St. Luke's v. St. Leonard's</i> (1794), 2 Anst. 395; 1 Bro. C. C. 40 253, 258	
<i>St. Mary's, Newington v. Jacobs</i> (1871), L. R. 7 Q. B. 47; 41 L. J. M. C. 72; 25 L. T. 800; 20 W. R. 249 186	
<i>Salisbury v. Great Northern Rail. Co.</i> (1858), 5 C. B. (N.S.) 174; 28 L. J. C. P. 40; 5 Jur. (N.S.) 70 180, 183	
<i>Salmon v. Bensley</i> (1825), Ry. & Moo. 189 213	
<i>Sampson v. Hoddinott</i> (1857), 1 C. B. (N.S.) 590; 26 L. J. C. P. 148; 5 W. R. 230; 3 Jur. (N.S.) 243 51—53	
<i>Schwinge v. Dowell</i> (1862), 2 F. & F. 845 6	
<i>Scoones v. Morrell</i> , 1 Beav. 251 180	
<i>Scott v. Firth</i> , 4 F. & F. 349 4	
<i>Scrutton v. Brown</i> (1825), 4 B. & C. 485; 6 D. & R. 536 30, 36, 47, 48	

TABLE OF CASES.

XXXV

	PAGE
Seal, <i>In re</i> , [1894] 1 Ch. 316; 63 L. J. Ch. 275; 70 L. T. 329	
[C. A.]	222
Searl v. Cooke (1890), 43 Ch. D. 519; 59 L. J. Ch. 259; 62 L. T.	
211	148, 260
Selby v. Nettleford (1873), L. R. 9 Ch. App. 111; 43 L. J. Ch. 359;	
29 L. T. 661; 22 W. R. 142	186
Sharp v. Wilson (1905), 21 T. L. R. 679	51
Sharrod v. London and North Western Rail. Co. (1849), 4 Ex. 580;	
14 Jur. 23; 7 D. & L. 213	115
Shore v. Wilson (1842), 9 Cl. & F. 355... ..	219
Shott's Iron Co. v. Inglis (1882), 7 App. Cas. 518	4
Shubbrook v. Tufnell (1882), 46 L. T. 886	17, 79
Shuttleworth v. Le Fleming (1865), 19 C. B. (N.S.) 687; 34 L. J.	
C. P. 309; 14 W. R. 13; 11 Jur. (N.S.) 840	11, 60
Siddons v. Short (1877), 2 C. P. D. 512; 46 L. J. C. P. 795; 37 L. T.	
230	79
Simpson v. Att.-Gen., [1904] A. C. 476; 69 J. P. 85; 74 L. J. Ch. 1;	
91 L. T. 610; 20 T. L. R. 761; 3 L. G. R. 190	43
——— v. Dendy (1860), 8 C. B. (N.S.) 433; 9 Jur. (N.S.) 1197	180
	182, 184
Sitwell v. Londesborough (Earl), [1905] 1 Ch. 460; 74 L. J. Ch.	
254; 53 W. R. 445	78, 83
Simcox v. Yardley Rural District Council (1905), 69 J. P. 66	94
Smith v. Andrews, [1891] 2 Ch. 678; 65 L. T. 175	58, 59
——— v. Darby (1872), L. R. 7 Q. B. 716; 42 L. J. Q. B. 140;	
26 L. T. 762; 20 W. R. 982	83, 84
——— v. Giddy, [1904] 2 K. B. 448; 73 L. J. K. B. 894; 91 L. T.	
296; 53 W. R. 207; 20 T. L. R. 596	209, 210
——— v. Howden (1863), 14 C. B. (N.S.) 398	181
——— v. Lucas (1881), 18 Ch. D. 531; 45 L. T. 460; 30 W. R.	
451	219
——— v. Kenrick (1849), 7 C. B. 564	120
Snow v. Whitehead (1884), 27 Ch. D. 588; 53 L. J. Ch. 885;	
51 L. T. 253; 33 W. R. 128	121
Solme v. Bullock (1684), 3 Lev. 165	60
Somerset (Duke) v. Fogwell (1826), 5 B. & C. 875; 5 L. J. (O.S.)	
K. B. 49; 8 Dow. & Ry. (K. B.) 747; 29 R. R. 449	40, 61
Southwark and Vauxhall Water Co. v. Wandsworth Board of Works,	
[1898] 2 Ch. 603; 62 J. P. 756; 79 L. T. 132; 47 W. R. 107;	
14 T. L. R. 576 [C. A.]	76
Speer v. Crawter (1817), 2 Mer. 410	253
Spencer's Case, 5 Co. Rep. 16	98
Spike v. Harding (1878), 7 Ch. D. 871; 47 L. J. Ch. 325; 38 L. T.	
285	148, 149, 262
Spooner v. Day (1636), Cro. Car. 432	11
Spyer v. Spyer (1631), Nels. 14	149
Staffordshire, etc., Canal Co. v. Birmingham Canal Co. (1866),	
L. R. 1 H. L. 254; 35 L. J. Ch. 757	23
Standard Bank of B. S. A. v. Stokes (1878), 9 Ch. D. 68; 47 L. J. Ch.	
554; 38 L. T. 672; 26 W. R. 492... ..	128, 143, 146, 250
Standen v. Christmas (1847), 10 Q. B. 135; 16 L. J. Q. B. 265;	
11 Jur. 694	245
Stanley v. White (1811), 14 East, 332	183
Star v. Rookesby (1710), 1 Salk. 335	95, 100, 106

	PAGE
Stedman <i>v.</i> Smith (1857), 8 E. & B. 1 ; 26 L. J. Q. B. 314 ; 3 Jur. (N.S.) 348	131
Stevens <i>v.</i> Whistler (1809), 11 East, 51...	179
Stewart <i>v.</i> Greenock Harbour Trustees, 4 Sc. Sess. Cas. 283...	47
Stone and Hastic. <i>In re</i> , [1903] 2 K. B. 463 ; 68 J. P. 44 ; 72 L. J. K. B. 846 ; 89 L. T. 343 ; 52 W. R. 130 ; 19 T. L. R. 654 [C. A.]	141, 147
Stransham <i>v.</i> Cullington (1591), Cro. Eliz. 228	157
Sturgess <i>v.</i> Bridgman (1879), 11 Ch. D. 852 ; 48 L. J. Ch. 785 ; 41 L. T. 219 ; 28 W. R. 200	4, 11, 27
Sturla <i>v.</i> Freccia (1880), 5 App. Cas. 623 ; 44 J. P. 812 ; 50 L. J. Ch. 86 ; 43 L. T. 209 ; 29 W. R. 217	238
Susfield <i>v.</i> Brown (1864), 33 L. J. Ch. 249 ; 4 De G. J. & S. 185	9
Sutcliffe <i>v.</i> Booth (1863), 9 Jur. (N.S.) 1037	50, 58
Sutherland (Duke) <i>v.</i> Heathcote, [1892] 1 Ch. 475 ; 61 L. J. Ch. 248	7
Swift <i>v.</i> M'Tiernan (1848), 11 Ir. Eq. R. 1	242
Swindon Waterworks Co. <i>v.</i> Wilts and Berks Canal Navigation Co. (1875), L. R. 7 H. L. 697 ; 45 L. J. Ch. 638 ; 33 L. T. 513 ; 24 W. R. 284	53

T.

Talbot <i>v.</i> Lewis (1834), 1 C. M. & R. 495 ; 6 C. & P. 603 ; 5 Tyr. 1:	226, 229
Tamplin <i>v.</i> James (1880), 15 Ch. D. 216 ; 43 L. T. (N.S.) 520	222
Taylor <i>v.</i> Devey (1837), 7 A. & E. 409 ; 2 N. & P. 469 ; 1 Jur. 892 :	159, 228, 244
——— <i>p.</i> Whitehead (1781), 2 Doug. 749	186
——— <i>v.</i> Witham (1876), 3 Ch. D. 605 ; 45 L. J. Ch. 798 ; 24 W. R. 877	243
Tenant <i>v.</i> Goldwin (1705), 1 Salk. 360	96, 103
Thomas <i>v.</i> Jenkins (1837), 6 A. & E. 525 ; 1 N. & P. 588 ; 1 Jur. 261	230
Thompson <i>v.</i> Guyon (1831), 5 Sim. 65	154
——— <i>v.</i> Hickman, [1907] 1 Ch. 550 ; 76 L. J. Ch. 254 ; 96 L. T. 454 ; 23 T. L. R. 311	178, 180, 223
Tickle <i>v.</i> Brown (1836), 5 L. J. K. B. 119 ; 4 Ad. & E. 369 ; 1 Har. & W. 769 ; 6 Nev. & M. (K. B.) 230	26
Tilbury <i>v.</i> Silva (1890), 45 Ch. D. 98 ; 63 L. T. 141...	42, 60, 62, 180
Tisdall <i>v.</i> Parnell (1863), 14 Ir. C. L. R. 1	242
Titchmarsh <i>v.</i> Royston Water Co., Limited (1900), 81 L. T. 673	17
Todd <i>v.</i> Flight (1860), 9 C. B. (N.S.) 377 ; 30 L. J. C. P. 21 ; 3 L. T. 325 ; 9 W. R. 145	150
Tone <i>v.</i> Preston (1883), 24 Ch. D. 739 ; 53 L. J. Ch. 50 ; 49 L. T. 99 ; 32 W. R. 166	78
Transham's Case (1590), Cro. Eliz. 178	157
Trinidad Asphalt Co. <i>v.</i> Ambard, [1899] A. C. 594 ; 68 L. J. P. C. 114 ; 81 L. T. 132 ; 48 W. R. 116...	75
Trotter <i>v.</i> Simpson, 5 C. & P. 51	131
Trower <i>v.</i> Chadwick, 6 Bing. N. C. 1 ; 8 Scott, 1	129

	PAGE
Truro Corporation <i>v.</i> Rowe, [1902] 2 K. B. 709; 66 J. P. 821; 71 L. J. K. B. 794; 87 L. T. 386; 18 T. L. R. 820; 51 W. R.	
68	32
Truscott <i>v.</i> Merchant Tailors' Co. (1856), 11 Ex. 855; 25 L. J. Ex. 173; 2 Jur. (N.S.) 356	26
Tunbridge Wells Corporation <i>v.</i> Baird, [1896] A. C. 434; 60 J. P. 188; 65 L. J. Q. B. 451; 74 L. T. 385	179
Turner <i>v.</i> Crush (1878), 3 Ex. D. 303; 4 App. Cas. 221; 48 L. J. Ex. 481; 40 L. T. 661; 27 W. R. 553	195
——— <i>v.</i> Morgan (1803), 8 Ves. 142	133
Tuthill <i>v.</i> West Ham Local Board (1873), L. R. 8 C. P. 447 ...	183
Tyne Improvement Commissioners <i>v.</i> Imrie (1899), 81 L. T. 174 ...	6
Tyringham's Case (1584), 4 Co. Rep. 36 b; Sav. 23... ..	12

U.

Union Lighterage Co. <i>v.</i> London Graving Dock Co., [1902] 2 Ch. 557; 71 L. J. Ch. 791; 87 L. T. 381; 18 T. L. R. 754: 17, 79—81	
Unwin <i>v.</i> Hanson, [1891] 2 Q. B. 115; 55 J. P. 622; 60 L. J. Q. B. 531; 65 L. T. 511; 39 W. R. 587... ..	191

V.

Van Diemen's Land Co. <i>v.</i> Table Cape Marine Board, [1906] A. C. 92; 75 L. J. P. C. 28; 93 L. T. 709; 54 W. R. 498; 22 T. L. R. 114	224
Vaspor <i>v.</i> Edwards (1701), 12 Mod. 661	246
Vennor, <i>Ex parte</i> , 3 Atk. 772	186
Vowles <i>v.</i> Miller (1810), 3 Taunt. 137	94
Voyce <i>v.</i> Voyce (1820), Gow, 201	132

W.

Waddington <i>v.</i> Naylor (1889), 60 L. T. 480	78, 128, 133
Wake <i>v.</i> Conyers (1759), 1 Eden, 331; 2 Cox, 360	252, 258
Walker <i>v.</i> Fletcher (1804), 3 Bli. (o.s.) 177	125
——— <i>v.</i> Horner (1875), 1 Q. B. D. 4; 45 L. J. M. C. 34; 33 L. T. 601; 24 W. R. 95	191, 214
Walter <i>v.</i> Pfeil (1829), M. & M. 364	130
Warner <i>v.</i> Baines, Amb. 589	133
Warwick <i>v.</i> Warwick (1745), 3 Atk. 293	223
Waterloo Bridge (Proprietors) <i>v.</i> Cull (1859), 5 Jur. (N.S.) 1288 ...	38
Waterman <i>v.</i> Soper (1697), 1 Ld. Raym. 737	132, 206
Waterpark <i>v.</i> Fennell (1859), 7 W. R. 634; 7 H. L. C. 650; 5 Jur. (N.S.) 1135	224
Watson <i>v.</i> Gray (1880), 14 Ch. D. 192; 49 L. J. Ch. 243; 42 L. T. 294; 28 W. R. 438	127, 131, 132, 136, 250, 251
Webb <i>v.</i> Banks (1760), 2 Eq. Cas. Ab. 164	258

	PAGE
Webber <i>v.</i> Lee (1882), 9 Q. B. D. 315; 47 J. P. 4; 51 L. J. Q. B. 485; 47 L. T. 215; 30 W. R. 866 [C. A.]	7, 12
Weeks <i>v.</i> Sparke (1813), 1 M. & S. 679	225
Wells <i>v.</i> Percy (1835), 4 L. J. C. P. 144; 1 Bing. N. C. 556; 1 Scott, 426	98
West Cumberland Iron Co. <i>v.</i> Kenyon (1879), 11 Ch. D. 782; 48 L. J. Ch. 793; 40 L. T. 703 [C. A.]	121
West Leigh Colliery Co., Limited <i>v.</i> Tunncliffe and Hampson, Limited, [1908] A. C. 27; 77 L. J. Ch. 102; 98 L. T. 4; 21 T. L. R. 146	72—74, 124
Westminster Brymbo Coal Co. <i>v.</i> Clayton (1867), 36 L. J. Ch. 476; 122	
Weston <i>v.</i> Arnold (1873), L. R. 8 Ch. App. 1084; 43 L. J. Ch. 123; 22 W. R. 284	135
Wetter <i>v.</i> Dunk (1864), 4 F. & F. 298	113
Whaley <i>v.</i> Brancher (1864), 10 Jur. (N.S.) 535	125
——— <i>v.</i> Dawson (1805), 2 Sch. & Lef. 367	258
Wheeldon <i>v.</i> Burrows (1879), 12 Ch. D. 31; 48 L. J. Ch. 853; 41 L. T. 327; 28 W. R. 196	15, 17, 80
White <i>v.</i> Birch (1867), 35 L. J. Ch. 174; 15 L. T. (N.S.) 605; 15 W. R. 305	221
——— <i>v.</i> Hill (1844), 6 Q. B. 487; 14 L. J. Q. B. 79; 9 Jur. 129; 183	
——— <i>v.</i> Warner (1817), 2 Mer. 459	153
White's Charities, <i>In re</i> , [1898] 1 Ch. 659; 67 L. J. Ch. 430; 78 L. T. 550	179, 180
Whitfield <i>v.</i> Bewitt (1724), 2 P. Wms. 242	151
——— <i>v.</i> Weedon (1772), 2 Chitty R. 685	151
Whitmores (Edenbridge), Limited <i>v.</i> Stanford, [1909] 1 Ch. 427; 78 L. J. Ch. 144; 99 L. T. 924; 25 T. L. R. 169	26, 50
Wickham <i>v.</i> Hawker (1840), 10 L. J. Ex. 153; 7 M. & W. 63	7
Wigford <i>v.</i> Gill, Cro. Eliz. 269	128
Wilberforce <i>v.</i> Hearfield (1877), 5 Ch. D. 709; 46 L. J. Ch. 584; 25 W. R. 861	237
Wilde <i>v.</i> Minsterley (1639), 2 Roll. Ab.	76
Williams <i>v.</i> Bagnall (1867), 15 W. R. 272; 10 Jur. (N.S.) 987	120
——— <i>v.</i> Golding (1865), L. R. 1 C. P. 69; 35 L. J. C. P. 1; 13 L. T. 291; 14 W. R. 60; 11 Jur. (N.S.) 952; 1 Har. & Ruth. 18	140, 146
——— <i>v.</i> Morgan (1850), 15 Q. B. 782	230
——— <i>v.</i> Morland (1824), 2 L. J. (O.S.) K. B. 191; 2 B. & C. 910; 4 Dow. & Ry. 583; 26 R. R. 579	10
Willingale <i>v.</i> Maitland (1866), L. R. 3 Eq. 103; 36 L. J. Ch. 64; 15 W. R. 83	13, 215
Willis <i>v.</i> Parkinson (1817), 2 Mer. 507; 1 Swans. 9	260, 261
Willoughby (Lord) <i>v.</i> Foster (1553), 1 Dyer, 80 b	220
Wilson <i>v.</i> Newberry (1871), L. R. 7 Q. B. 31; 41 L. J. Q. B. 31; 25 L. T. 695	210
Wiltshire <i>v.</i> Sidford (1827), 1 M. & R. 403; 8 B. & C. 259	127, 128
Wingate <i>v.</i> Waite (1840), 6 M. & W. 739; 4 Jur. 860	64
Winston <i>v.</i> Greenbank (1745), Willis, 583	213
Winterbottom <i>v.</i> Derby (Lord) (1867), L. R. 2 Ex. 316; 36 L. J. Ex. 194; 16 L. T. 771	214
Wintle <i>v.</i> Carpenter (1680), Rep. t. Finch, 462	259
Wood <i>v.</i> Leadbitter (1845), 14 L. J. Ex. 161; 13 M. & W. 538; 9 Jur. 187	14
——— <i>v.</i> Wand (1849), 18 L. J. Ex. 305; 3 Ex. 748; 13 Jur. 742; 10, 51, 55, 58	

	PAGE
Woodard <i>v.</i> Billericay H. B. (1879), 11 Ch. D. 214 ; 48 L. J. Ch. 535 ; 27 W. R. 593	191, 214
Woolaston <i>v.</i> Wright (1797), 3 Anst. 801	258
Woolway <i>v.</i> Rowe (1834), 1 A. & E.	244
Wright <i>v.</i> Howard (1823), 1 L. J. Ch. 94 ; 1 Sim. & St. 190 ...	41, 55
—— <i>v.</i> Williams (1836), 5 L. J. Ex. 107 ; 1 M. & W. 77 ; 1 Tyr. & Gr. 375	10, 56
Wrotesley <i>v.</i> Adams (1558), Plow. 187... ..	220
Wyatt <i>v.</i> Great Western Rail. Co., 6 B. & S. 709 ; 34 L. J. Q. B. 204 ; 12 L. T. 568 ; 13 W. R. 837 ; 11 Jur. (N.S.) 825 :	211
—— <i>v.</i> Harrison (1832), 1 L. J. K. B. 237 ; 3 B. & Ad. 871 ...	76

Y.

Young <i>v.</i> Bankier Distillery Co., [1893] A. C. 691 ; 58 J. P. 100 ; 69 L. T. 838	121
Yorkshire Rivers Board <i>v.</i> Tadcaster District Council, 97 L. T. 436 :	40
Ystradgunlais Tithe Commutation, <i>Re</i> (1844), 8 Q. B. 32	161

THE LAW OF BOUNDARIES AND FENCES.

CHAPTER I.

INTRODUCTION.

SECT.	PAGE
1.— <i>Scope of the Book</i>	1
2.— <i>Concerning Ownership in Land</i>	2
3.— <i>Rights in Land not Involving Ownership</i>	5
4.— <i>Title Based on Long Possession</i>	18

SECTION 1.—THE SCOPE OF THE BOOK.

Scope of the Book.—The aim of this Book is to furnish the reader with an exposition of the main principles of law which are generally material in the solution of the question of the whereabouts of a boundary, and of the question of the rights and obligations of neighbours in respect of a boundary (*a*). The law with regard to fences and the obligation of fencing, and with regard to walls, is embraced as a collateral and subsidiary subject.

However easy it may be to define the scope of the Work, the field of law is vast, over which the reader must

(*a*) In some cases it has been found necessary to deal with the rights of the public, notably with regard to the sea and tidal and navigable rivers (see Chap. II.), with regard to the obligations of fencing (see Chap. IV.), and with regard to highways (see Chap. IX.).

travel to find answers to these two questions. For this reason, therefore, this Book will be found to treat of divers principles and rules of law which may appear to a superficial reader to digress from the subject. But without an exposition of these principles and rules of law, treatment of the law relating to boundaries would be impossible.

Prefatory Remarks concerning Boundaries and Fences.—At the outset it is well to explain that there is no legal significance in the terms “boundary” and “fence.” If a definition of the term “boundary” be required, it may be defined as the ascertainable limits of the substance over which a particular person’s ownership extends (*b*). The meaning of the term “fence” is too well known to require definition.

Boundaries may be divided into two categories, viz. : (1) boundaries ascertainable by reference to some physical feature (*c*) ; and (2) boundaries ascertainable by mensuration (*d*).

SECTION 2.—CONCERNING OWNERSHIP IN LAND.

Land as the Subject-Matter of Ownership.—Land regarded as the subject-matter of ownership is in the eye of the law a corporeal substance, the limits of which are ascertainable by the three dimensions of length, breadth and depth. Thus, a man may own the surface of the land only, while another owns the soil below it. This is

(*b*) In previous editions of this book, some attention was paid to the various definitions given by various writers to the term “boundary.” The Editor, however, holds the view that it is not only unnecessary but misleading to direct the reader’s attention to definitions of this kind.

(*c*) *E.g.*, a fault intersecting a mine, where the property consists of mines (*Davis v. Shepherd* (1866), L. R. 1 Ch. App. 410), or the landward limits of the foreshore. See p. 29, *post*.

(*d*) It is obvious that where boundaries are ascertainable by mere mensuration, the mensuration must have reference to some physical feature.

very usual in mining districts. Again, a man may own a substratum and the surface may be owned by another who also owns a substratum below that of the first owner. In short, a man may own a mass of land of any shape or size.

Usual Form of Ownership of Land.—The usual form of ownership of land is ownership of the surface and everything which is above or below it. The predominance of this form of land ownership is obviously due to the fact that the use of the surface is the primary benefit arising from the ownership of land. For this reason, also, the dimensions of length and breadth which limit the superficial area always have been, and still are, of primary importance in defining the subject-matter of a man's ownership in land. It is generally only in cases where the subsoil has a particular and peculiar value that attention is drawn to the dimension of depth.

Presumption that the Owner of the Surface Owns the Subsoil.—The predominant importance of the dimensions of length and breadth is illustrated by the ancient and well-known phrase, "*cujus est solum ejus est usque ad inferos*" (*e*). As we have seen this maxim is not to be taken literally. But there is a presumption that the owner of the surface is the owner of the subsoil (*f*), and that he who is in possession of the surface is also in possession of the subsoil (*g*).

Ownership of Things upon and above the Surface.—The ownership of the surface bestows *primâ facie* the ownership of all things growing upon or affixed to the soil, such as trees, crops and other vegetable matter and

(*e*) See Shep. Touch. 90 ; 2 Bla. Com., p. 18.

(*f*) *Keyse v. Powell* (1853), 2 E. & B. 132, at p. 144 ; *Lewis v. Branthwaite* (1831), 2 B. & Ad. 437.

(*g*) *Lewis v. Branthwaite*, *supra*, at p. 443 ; *Midland Rail. Co. v. Wright*, [1901] 1 Ch. 738, at p. 744.

buildings (*h*). In some cases, notably in some of the Inns of Court, the floors of buildings are owned as separate freeholds (*i*) ; but this is rare.

Benefits Flowing from the Right of Ownership of Land.—The ownership of land bestows a right upon the owner of using his land (subject to certain limitations which we shall mention presently) in any way he pleases—thus, he may work it and take the natural fruit arising from his labours or growing naturally upon the land, or he may leave it derelict, or he may build upon it (*k*) or excavate (*l*). Again, the law bestows a right upon the owner of land to enjoy his land free from annoyance by his neighbour—thus his neighbour must abstain from sending noxious gases over his land (*m*), from making an undue noise (*n*), or causing undue vibration (*o*).

Mutual Curtailment of Freedom of User and Enjoyment of Land.—As every owner of land has a right in respect of his land similar to his neighbour, to use and enjoy his land, it necessarily follows that the rights of each particular owner are curtailed so as to give effect to the rights of his neighbour. The principle is embodied in the maxim, “*sic utere tuo ut alienum non laedas.*” An apt illustration of the principle occurs in the case of an owner excavating near his boundary. His excavations

(*h*) Shep. Touch., p. 90 ; Co. Litt. 4a.

(*i*) See Williams' Law of Real Property (21st ed.), p. 34. “A man,” says Lord COKE (Co. Litt. 48 b), “may have an inheritance in an upper chamber, though the lower buildings and soil be in another.” See also *Dalton v. Angus* (1881), 6 App. Cas. 740, at p. 793.

(*k*) See *Dalton v. Angus*, *supra*, at pp. 772, 780.

(*l*) See *Dalton v. Angus*, *supra*, at pp. 752, 809.

(*m*) *Crump v. Lambert* (1867), L. R. 3 Eq. 409 ; *Shott's Iron Co. v. Inglis* (1882), 7 App. Cas. 518.

(*n*) *Crump v. Lambert*, *supra* ; *Ball v. Ray* (1873), L. R. 8 Ch. App. 467 ; *Polsue and Alfieri, Limited v. Rushmer*, [1907] A. C. 121.

(*o*) *Scott v. Firth*, 4 F. & F. 349 ; *Sturges v. Bridgman* (1879), 11 Ch. D. 852 ; *Colwell v. St. Pancras Borough Council*, [1904] 1 Ch. 707.

are justifiable, but if the result of his works is to deprive his neighbour's land of support he is liable to his neighbour for the consequences (*p*). Again, a man may in general impound water upon his land, but if he allows it to escape to the detriment of his neighbour he commits a wrong (*q*).

Conventional Curtailment and Enhancement of Rights of User and Enjoyment.—It is not proposed to attempt to give an exhaustive list of the rights of user and enjoyment which flow from the ownership of land. It would be impossible to do so. But it is highly important to preserve a clear distinction between such of the rights of landowners as arise by reason of their ownership of the land, and such of their rights as do not so arise, but are created by act of parties, and subsist as rights analogous to rights of the first-mentioned category. Rights falling under the first category are said to be “natural rights,” or “rights *ex jure nature*” ; rights of the second category are called “accessorial” or “conventional rights.” The latter modify the former. The natural rights of the owner to whom the accessorial right is granted are increased, while those of the owner affected by the grant are correspondingly curtailed (*r*).

SECTION 2.—RIGHTS IN LAND NOT INVOLVING OWNERSHIP.

Rights in Alieno Solo.—For our purposes the most important accessorial rights are those which are exercisable over a neighbour's land, viz., easements, *profits à prendre* and local customary rights. To these must be added the rights of highway and navigation. The first three of these categories of rights are private rights *in alieno solo* ; the last two categories are public rights *in alieno solo*. Rights *in alieno solo* have this highly important bearing

(*p*) See, generally, Chap. III., *post*.

(*q*) *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330.

(*r*) See, further, on this subject, Combe's Law of Light (1911), pp. 2, 3.

upon our subject, viz., that their exercise tends to confuse boundaries. A boundary is not, so to speak, effective as against the owner of a private right *in alieno solo*. Further, where acts of ownership are relied upon in proof of the whereabouts of a boundary, as is often the case (*s*), it often becomes a question whether such acts of ownership are referable to the exercise of a right *in alieno solo*; for if such be the case they are no evidence of the ownership of the soil (*t*).

Public Rights in Alieno Solo.—The public rights *in alieno solo* which most often affect questions of boundaries are the rights of highway by land and water (*u*). Public rights of navigation are highways by water (*x*). The public cannot claim a *profit à prendre in alieno solo* (*y*), although they may enjoy a general right of fishing in the sea and tidal waters (*z*). The public have no right to wander at will over open land (*a*). The *jus spatiandi* is a right unknown to the English law (*b*). Where wide open spaces are available to the public, it will be found that the facilities afforded for public recreation are not based on a public right *in alieno solo*.

Private Rights in Alieno Solo.—Although perhaps they do not exhaust all the categories of rights which might be classed under private rights *in alieno solo*, easements and *profits à prendre*, and, to a lesser degree,

(*s*) See p. 244, *post*.

(*t*) See p. 33, *post*.

(*u*) As to highways by land, see Chap. IX., *post*.

(*x*) *Original Hartlepool Collieries Co. v. Gibb* (1877), 5 Ch. D. 713. As to public rights of navigation, see Chap. II., *post*.

(*y*) *Hargreaves v. Diddams* (1875), L. R. 10 Q. B. 582; *Murphy v. Ryan* (1868), I. R. 2 C. L. 143.

(*z*) See Chap. II., p. 30, *post*.

(*a*) *Att.-Gen. v. Antrobus*, [1905] 2 Ch. 188.

(*b*) *International Tea Stores Co. v. Hobb*, [1903] 2 Ch. 165, at p. 172; *Schwinge v. Dowell* (1862), 2 F. & F. 845; *Tyne Improvement Commissioners v. Imrie* (1899), 81 L. T. 174.

customary rights *in alieno solo*, are the categories of private rights which call for our attention in this Book.

An easement may be defined as a right to use another's land for a specific purpose connected with the user and enjoyment of the land of the person so exercising the easement (*c*). The right may be a right to do some act upon the other's land, or it may be a right to prevent the other from doing something on his own land which but for the easement he would be entitled to do. The right can never entitle a person to take any profit from, or any part of, the land of another (*d*).

A *profit à prendre* may be defined as a right to take the fruit or natural product, or some part of the soil itself, of the land of another (*e*).

A customary right *in alieno solo* is a right subsisting by immemorial local custom, entitling a definite but fluctuating body of persons to use the land of a private owner for a definite purpose (*f*), not involving the taking of the fruit or natural product of the land or of any part of the soil thereof (*g*).

Concerning Easements.—No man can have an easement over his own land (*h*). He must enjoy the easement

(*c*) See *Termes de la Ley*, tit. Easement; *Hewlins v. Shippam* (1826), 5 B. & C. 221, at pp. 229, 230; *Mounsey v. Ismay* (1865), 3 H. & C. 486, at p. 497.

(*d*) See *Manning v. Wasdale* (1836), 5 A. & E. 758; *Bailey v. Appleyard* (1838), 8 A. & E. 161; *Blewett v. Tregonning*, *infra*.

(*e*) *Sutherland (Duke) v. Heathcote*, [1892] 1 Ch. 475, at p. 484; *Webber v. Lee* (1882), 9 Q. B. D. 315; *Manning v. Wasdale*, *supra*; *Bailey v. Appleyard*, *supra*; *Wickham v. Hawker* (1840), 7 M. & W. 63, at p. 79; *Race v. Ward* (1855), 4 E. & B. 702, at p. 709. As to the things which may compose the subject-matter of a *profit à prendre*, see p. 12, *post*.

(*f*) See *Mounsey v. Ismay* (1865), 3 H. & C. 486; *Mercer v. Deme*, [1904] 2 Ch. 534; *Brocklebank v. Thompson*, [1903] 2 Ch. 344; *Race v. Ward*, *supra*.

(*g*) *Blewett v. Tregonning* (1835), 3 Ad. & El. 554, at p. 575.

(*h*) *Metropolitan Rail. Co. v. Fowler*, [1892] 1 Q. B. 165, at p. 171 (Lord Esher).

upon the land of another. But he must enjoy it by reason of his ownership of land. The land in respect of which he enjoys the right is called the "dominant tenement"; the land over which he exercises the right is called the "servient tenement" (*i*). To every true easement a dominant and a servient tenement is necessary (*k*). There is no such thing as an easement in gross (*l*).

Easements are said to be either "affirmative" or "negative." Sometimes an affirmative easement is called a positive easement in contradistinction to negative easements. An affirmative easement is one which involves an exercise of the right upon the soil of the servient tenement (*m*). A negative easement is not exercised on the servient tenement, but consists of a right to prevent the owner of the servient tenement doing some act upon his tenement which, had it not been for the easement, he might have rightfully done (*n*).

Varieties of Easements.—The most important varieties of easements for our purposes are rights of way, rights in respect of streams, and easements of support. But these do not exhaust the varieties of easements. Provided the alleged right conforms to certain essential characteristics, there appears to be no reason to limit the varieties of form which an easement may take. Thus the following privileges or accommodations have been upheld or recognised as valid easements—a right to erect

(*i*) The owner of the dominant tenement is generally called "the dominant owner," and that of the servient tenement "the servient owner."

(*k*) *Rangeley v. Midland Rail. Co.* (1868), L. R. 3 Ch. App. 306, at p. 310 (Lord CAIRNS).

(*l*) *Ackroyd v. Smith* (1850), 10 C. B. 164, at pp. 187, 188. See also *Keppell v. Bailey* (1833), 2 My. & K. 517, at pp. 535, 536.

(*m*) As in the case of a right of way.

(*n*) *E.g.*, a right to prevent building so as to obscure window lights (see Combe's Law of Light); a right to prevent excavations so as to interfere with the support of buildings (see p. 77, *post*).

and maintain a signpost on a common (*o*) ; a right to hang clothes on lines over another's land (*p*) ; a right to protrude ships' bowsprits over the boundary of a dock (*q*) ; a right to affix and maintain a nameplate on another's house (*r*) ; a right to use a fascia on another's wall (*s*) ; a right to place a swinging signboard on another's wall (*t*) ; a right to nail trees to another's wall (*u*) ; a right to build so as to overhang another's land (*x*) ; a right to move a timber traveller over the servient tenement (*y*) ; the right to make use of another's kitchen for a particular purpose (*z*) ; the right to erect advertisement hoardings on another's land (*a*) ; the right to affix and maintain telephone wires on another's buildings (*b*) ; the right to mix manure in another's yard (*c*) ; the right to go on to a neighbour's land to draw and carry away water from a spring (*d*) ; the right to discharge coal dust over the servient tenement (*e*) ; and the right to erect spoil banks on another's land in the course of mining operations (*f*).

(*o*) *Hoare v. Metropolitan Board of Works* (1874), L. R. 9 Q. B. 296.

(*p*) *Drewell v. Towler* (1832), 3 B. & Ad. 735.

(*q*) *Suffield v. Brown* (1864), 33 L. J. Ch. 249.

(*r*) *Lane v. Dixon* (1847), 3 C. B. 776.

(*s*) *Francis v. Hayward* (1882), 20 Ch. D. 773 ; 22 Ch. D. 177, 182 [C. A.].

(*t*) *Moody v. Steggles* (1879), 12 Ch. D. 261.

(*u*) *Hawkins v. Wallis* (1763), 2 Wils. 173.

(*x*) See *Lemmon v. Webb*, [1894] 3 Ch. 1, at p. 18 [C. A.].

(*y*) *Harris v. De Pinna* (1886), 33 Ch. D. 238 [C. A.].

(*z*) *Heywood v. Mallalieu* (1883), 25 Ch. D. 357.

(*a*) *R. v. St. Pancras Assessment Committee* (1877), 2 Q. B. D. 581, 586, 587.

(*b*) *Lancashire Telephone Co. v. Manchester Overseers* (1884), 14 Q. B. D. 267, 272 [C. A.].

(*c*) *Pye v. Mumford* (1848), 11 Q. B. 666. In this case, however, the right was claimed as a *profit à prendre*.

(*d*) *Race v. Ward* (1855), 4 E. & B. 702.

(*e*) *Royal Mail Steam Packet Co. v. George*, [1900] A. C. 480.

(*f*) *Rogers v. Taylor* (1857), 1 H. & N. 706.

The varieties of easements which have been recognised in respect of water, streams and rivers are also very numerous (*g*). Thus, an easement may bestow the right to increase the velocity of a stream (*h*) ; to dam the flow by means of weirs (*i*) ; to alter the state of the water by pollution (*k*) ; to discharge water on to another's land (*l*) ; to cleanse the beds of streams and waterways and to repair their banks (*m*) ; to enter on to another's land in times of flood in order to open sluices to allow the water to escape (*n*) ; to fix posts in the beds of rivers (*o*) ; to erect fishing weirs across streams or rivers (*p*).

In addition to the foregoing varieties of easements, all of which, it will have been observed, are of an affirmative nature, there are many easements which are purely negative in their operation. The well-known easements of light and of support are familiar instances of negative easements. The latter of these rights will be dealt with more fully in a subsequent chapter (*q*).

Again, there are some easements which are neither affirmative or negative. This third class consists of rights

(*g*) See, generally, as to easements in respect of water, pp. 55 *et seq.*, *post*.

(*h*) *Williams v. Morland* (1824), 2 B. & C. 910.

(*i*) *Beeston v. Weate* (1856), 5 E. & B. 986.

(*k*) *Hall v. Lund* (1863), 1 H. & C. 676 ; *Wood v. Waud* (1849), 3 Ex. 748 ; *Wright v. Williams* (1836), 1 M. & W. 77 ; *Crossley & Sons, Limited v. Lightowler* (1867), L. R. 2 Ch. App. 478 ; *Att.-Gen. v. Dorking Union* (1882), 20 Ch. D. 595, 601 ; *Baxendale v. McMurray* (1867), L. R. 2 Ch. App. 790 ; *McIntyre Bros. v. McGavin*, [1893] A. C. 268.

(*l*) *Arkwright v. Gell* (1839), 5 M. & W. 203 ; *Brown v. Dunstable Corporation*, [1899] 2 Ch. 378 ; *Gaved v. Martyn* (1865), 19 C. B. (N.S.) 732 ; *Curlyon v. Lovering* (1856), 1 H. & N. 784.

(*m*) *Beeston v. Weate* (1856), 5 E. & B. 986 ; *Peter v. Daniel*, 5 C. B. 568.

(*n*) *Att.-Gen. v. Simpson*, [1901] 2 Ch. 698.

(*o*) *Lancaster v. Eve* (1859), 5 C. B. (N.S.) 707.

(*p*) *Rolle v. Whyte* (1868), L. R. 3 Q. B. 286.

(*q*) As to the easement of support, see pp. 69 *et seq.*, *post*. The reader is referred to Combe's Law of Light.

to cause a disturbance of amenities, a disturbance which, were it not for the existence of the easement, would render the dominant owner liable on the ground of nuisance. Thus, there may be an easement entitling the dominant owner to allow noxious gases and vapours to escape from the dominant tenement (*r*); or to make an undue noise on his tenement (*s*); or to cause undue vibration to affect the servient tenement (*t*).

Profits a Prendre.—Although in many respects analogous to an easement, a *profit à prendre* possesses certain essential characteristics which require to be mentioned. In the first place a *profit à prendre* may exist as a right in gross (*u*), that is to say, a man may have a right to a *profit à prendre* as a separate incorporeal hereditament (*x*) and a separate tenement (*y*), apart from his ownership of land. As we have seen this is impossible in the case of an easement (*z*).

A *profit à prendre* frequently occurs as a right appurtenant to land; and it may also occur as a right

(*r*) See *Bliss v. Hull* (1838), 4 Bing. N. C. 183; *Crump v. Lambert* (1867), L. R. 3 Eq. 409, at p. 413.

(*s*) See *Sturges v. Bridgman* (1879), 11 Ch. D. 852. See also *Lyttelton Times Co., Limited v. Warners, Limited*, [1907] A. C. 476.

(*t*) *Sturges v. Bridgman*, *supra*. See also *Lyttelton Times Co., Limited v. Warners, Limited*, *supra*.

(*u*) *Shuttleworth v. Le Fleming* (1865), 19 C. B. (N.S.) 687; *Webber v. Lee* (1882), 9 Q. B. D. 315 [C. A.]; *Chesterfield (Lord) v. Harris*, [1908] 2 Ch. 397, at p. 421. See also *Daniel v. Hanslip* (1672), 2 Lev. 67; *Johnson v. Barnes* (1873), L. R. 8 C. P. 527; *Spooner v. Day* (1636), Cro. Car. 432.

(*x*) *Fitzgerald v. Firbank*, [1897] 2 Ch. 96. A *profit à prendre* is an incorporeal hereditament, as it is capable of descending apart from land to the heir of the grantee as a separate object of property. Although easements are frequently spoken of as incorporeal hereditaments, the term does not appear to be, in strictness, correct.

(*y*) A *profit à prendre* is a tenement in the strict meaning of that term.

(*z*) See p. 7, *ante*.

“appendant.” This happens in the case of ancient rights of pasturage. Prior to the statute *Quia Emptores*, 1289(*a*), when a man was enfeoffed of arable land, the law bestowed on him certain rights over other lands of the manor(*b*); these rights included the important right of depasturing. These rights were said to be appendant to the land granted. The effect of the statute was that thenceforth these ancillary rights did not arise on feoffments(*c*). Hence all appendant rights, if valid, must have actually or theoretically existed from the year 1289. As appendant rights arose by common law they were said to be “of common right”(*d*).

Subject-Matters of Profits a Prendre.—The substance which forms the subject-matter of a *profit à prendre* may be mineral, vegetable or animal. By “mineral” we do not mean “mineral” only in the narrower sense of that term, but we use the word as embracing such substances as sand and shingle(*e*), stones(*f*), blown sand(*g*), in short, any part of the soil itself(*h*), including those portions of the soil which are usually designated minerals in the narrow legal sense(*i*). Rights to take vegetable matter, such as brakes, heather, litter and fern(*k*), acorns and beech mast(*l*), turf and peat(*m*), the boughs and

(*a*) 18 Edw. 1, c. 1.

(*b*) See *Dunraven (Lord) v. Llewellyn* (1850), 15 Q. B. 791.

(*c*) Rights appendant were connected with the tenure created on enfeoffment. As enfeoffments after the statute did not create tenure, rights appendant did not arise after the statute.

(*d*) See *Tyrringham's Case* (1584), 4 Co. Rep. 36 b.

(*e*) *Constable v. Nicholson* (1863), 14 C. B. (N.S.) 230.

(*f*) *Maxwell v. Martin* (1830), 6 Bing. 522.

(*g*) *Bewett v. Tregonning* (1835), 3 Ad. & E. 554.

(*h*) See e.g., *Maxwell v. Martin*, *supra*.

(*i*) For a definition of the term “minerals” in the narrow legal sense, see *Great Western Rail. Co. v. Carpalla United China Clay Co., Limited*, [1909] 1 Ch. 218, at p. 231 (FLETCHER MOULTON, L.J.).

(*k*) *De la Warr (Earl) v. Miles* (1881), 17 Ch. D. 535.

(*l*) *Chilton v. London Corporation* (1878), 7 Ch. D. 562.

(*m*) *Hayward v. Cunnington* (1668), 1 Lev. 231.

branches from growing trees (*u*), thorns (*o*), rushes (*p*), and grass (*q*), have been upheld or recognised as valid *profits à prendre*. So, also, have rights to take animal matter such as freshwater fish (*r*), pheasants (*s*), and game generally.

It is important to bear in mind that the subject-matter of a *profit à prendre* must be something which is capable of ownership (*t*). A *profit à prendre* is an interest in land within the meaning of the Statute of Frauds (*u*).

Creation of Easements.—An easement can only be created by grant or statute. The grant may be either express, implied, or presumed. Although in strictness estates cannot be created in easements, an easement may be created for interests analogous to estates in land. Thus, an easement may be created and subsist for an interest in perpetuity (*x*), or for life or lives, or for years, or even for shorter periods. But in every case the competency of the grantor is an essential element. Thus, to create an easement for a perpetual period the grantor must have the complete fee simple in the servient tenement in him at the time of the grant (*y*). There are, however, certain statutory modifications of this principle in the case of limited owners exercising statutory powers (*z*).

(*n*) *Willingale v. Maitland* (1866), 3 Eq. 103.

(*o*) *Dowglass v. Kendal* (1610), Cro. Jac. 256.

(*p*) *Bean v. Bloom* (1773), 2 W. Bla. 926.

(*q*) *Smith v. Brownlow (Earl)* (1870), L. R. 9 Eq. 241.

(*r*) *Fitzgerald v. Firbank*, [1897] 2 Ch. 96 [C. A.].

(*s*) *Lowe v. Adams*, [1901] 2 Ch. 598.

(*t*) *Race v. Ward* (1855), 4 E. & B. 702, at p. 709.

(*u*) *Webber v. Lee* (1882), 9 Q. B. D. 315.

(*x*) When an easement is claimed by prescription, it is presumed to have been created in perpetuity.

(*y*) In *Booth v. Alcock* (1873), L. R. 8 Ch. App. 663, the grant of an easement by a tenant for years was held not to bind the owners of the reversion.

(*z*) As to the creation of easements by a tenant for life under the Settled Land Acts, see 45 & 46 Vict. c. 38, ss. 3, 17 (1), and

If a man purports to grant an easement for a period which his estate or interest in the servient tenement at the time of the grant cannot support, he may be estopped from setting up the insufficiency of his estate if he subsequently acquires an estate in the servient tenement which would support the purported grant (*a*).

An easement cannot be created except by deed (*b*) or will (*c*). Where an easement arises by implied grant or, as it is said, by implication of law, it will be found to arise upon the execution of a deed (*d*). Where an easement is claimed under a presumed grant it is, at any rate in legal theory, based on a deed (*e*). But equitable rights to easements may subsist where no deed has been executed (*f*). But these equitable rights are not effectual against a purchaser for value of the legal estate in the servient tenement who had no notice of the equitable right (*g*).

No particular form of words are necessary to create an easement (*h*). Thus, words drawn in the form of a

53 & 54 Vict. c. 69, s. 5. These powers, with certain modifications, were extended to university and collegiate bodies by the Universities and College Estates Act, 1898 (61 & 62 Vict. c. 55).

(*a*) *Rowbotham v. Wilson* (1857), 8 E. & B. 123, at p. 145.

(*b*) *Hawkins v. Shippam* (1826), 5 B. & C. 221, at p. 229; *Bryan v. Whistler* (1828), 8 B. & C. 288, at p. 292; *Wood v. Leadbitter* (1845), 13 M. & W. 538; *Aldin v. Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437, at p. 448; Co. Litt. 9a.

(*c*) See e.g., *Pearson v. Spenser* (1863), 3 B. & S. 761; *Pheysey v. Vicary* (1847), 16 M. & W. 484; *Phillips v. Low*, [1892] 1 Ch. 47.

(*d*) An exception occurs in the case of a demise by parol or writing not under seal, where the term does not exceed three years and the rent reserved is more than two-thirds the full improved value of the premises (see 29 Car. 2, c. 3, s. 2; 8 & 9 Vict. c. 106, s. 3). As to whether an easement can arise in such a case without an express grant under seal, see Combe's Law of Light, pp. 74, 75.

(*e*) See p. 27, *post*.

(*f*) *McManus v. Cooke* (1887), 35 Ch. D. 681.

(*g*) *Prinsep v. Belgravian Estate, Limited*, W. N. (1896) 39. See also Combe's Law of Light (1911), p. 89.

(*h*) *Rowbotham v. Wilson* (1860), 8 H. L. Cas. 348, at p. 362; *Russell v. Watts* (1885), 10 App. Cas. 590, at p. 611.

covenant may have the effect of creating an easement (*i*), while on the other hand, words apparently apt for the granting of an easement may only operate as a covenant (*k*). There is an important distinction between a valid grant (whether in the form of a grant or in the form of a covenant amounting to a grant) and a covenant (whether in the form of a covenant or in the form of a grant operating only as a covenant), for in the former case the easement binds the servient tenement in the hands of all persons whether taking with notice or without notice, but in the latter case the obligation of the covenant only binds persons acquiring the servient tenement with notice of the covenant (*l*).

Implied Grants of Easements.—An implied grant of an easement arises upon a disposition of part of a man's property. Upon the severance, an accommodation previously afforded either by the severed part to the part retained (*m*), or by the part retained to the severed part (*n*), may ripen into an easement by virtue of the severance. It is, therefore, apparent that where an easement arises by implied grant, there must be, or have been, a common ownership in respect of the *quasi*-dominant and the *quasi*-servient tenement.

The question whether an easement arises by implied grant upon the severance of property is determined by reference to the presumed intention of the parties to the severance (*o*), and this must be ascertained upon the construction of the deed as construed in the light of the

(*i*) *Russell v. Watts*, *supra*, at p. 611. See *e.g.*, *Northam v. Hurley* (1853), 1 E. & B. 665.

(*k*) *Russell v. Watts*, *supra*, at p. 611.

(*l*) This distinction will be found more fully discussed in *Combe's Law of Light*, at pp. 57 *et seq.*

(*m*) See *e.g.*, *Pinnington v. Galland* (1853), 9 Ex. 1.

(*n*) See *e.g.*, *Palmer v. Fletcher* (1663), 1 Lev. 122.

(*o*) *Birmingham, Dudley and District Banking Co. v. Ross* (1888), 38 Ch. D. 295, 309, 311, 315; *Myers v. Catterson* (1889), 43 Ch. D. 470, 481.

circumstances subsisting at the time of its execution (*p*). As a general rule, however, an easement will more readily arise in a case where the *quasi*-dominant tenement is disposed of by the common owner, who retains the *quasi*-servient tenement, than in a case where the common owner disposes of the *quasi*-servient tenement and retains the *quasi*-dominant tenement (*q*). But this general rule is subject to the influence of another well-recognised rule, viz., that the readiness with which an easement arises upon a severance of property depends also upon the degree of necessity for the continuance of the former accommodation. A familiar instance of the last-mentioned rule occurs in the case of a “way of necessity” (*r*).

As the last-mentioned general rule governs the first-mentioned general rule, in some cases the necessity for the continuance of the former accommodation afforded by the *quasi*-servient tenement to the *quasi*-dominant tenement is such that where the common owner disposes of the *quasi*-servient tenement and retains the *quasi*-dominant tenement, that former accommodation ripens into a valid easement in favour of the common owner and his successors in title (*s*). It cannot, however, be predicted that any particular form of easement must always fall under the category of an easement of necessity, for in the first place

(*p*) *Godwin v. Schweppes, Limited*, [1902] 1 Ch. 926, at p. 934.

(*q*) *Wheeldon v. Burrows* (1879), 12 Ch. D. 31.

(*r*) As to ways of necessity, see *Pinnington v. Galland* (1853), 9 Ex. 1; *Pomfret v. Ricroft* (1669), 1 Wms. Saund. 321, 323 n. (6); *Gayford v. Moffatt* (1868), L. R. 4 Ch. App. 133, 135, 136; *London Corporation v. Riggs* (1880), 13 Ch. D. 798; *Brown v. Alabaster* (1887), 37 Ch. D. 490; *Procter v. Hodgson* (1855), 10 Ex. 824; *Bullard v. Harrison* (1815), 4 M. & S. 387; *Pearson v. Spencer* (1863), 3 B. & S. 767; *Miller v. Hancock*, [1893] 2 Q. B. 177, 180; *Howton v. Frearson* (1798), 8 T. R. 50; *Beaudley v. Brook* (1607), Cro. Jac. 189; *Holmes v. Goring* (1824), 2 Bing. 76; *James v. Dods* (1834), 2 Cr. & M. 266; *Bolton v. Bolton* (1879), 11 Ch. D. 968.

(*s*) *London Corporation v. Riggs* (1880), 13 Ch. D. 798; *Pinnington v. Galland* (1853), 9 Ex. 1, at p. 12; *Davies v. Sear* (1869), L. R. 7 Eq. 427.

the degree of necessity for the continuance of the accommodation varies in every case, so that an easement which may be properly called an easement of necessity in one case, may not be an easement of necessity in another case (*t*) ; and in the second place, in every case the question resolves itself into one as to the presumed intention of the parties (*u*). But in general, it may be said, that whereas rights of way and easements of supports (*x*) are often found to be of such necessity that when the *quasi*-dominant tenement is retained an easement arises by implied grant (*y*), easements relating to water seldom, and light easements never (*z*), fall under the category of easements of necessity.

Presumed Grant of Easements.—Where a privilege or accommodation has been enjoyed for many years by the owners of a piece of land over land belonging to another, the law will presume a grant of the right, as an easement, although no actual grant can be shown. This is under the doctrine of prescription—a doctrine which has a long history, is abstruse in its theory, and presents many difficulties in its application. Broadly speaking, the doctrine of prescription bears the same relationship to such incorporeal rights as easements and *profits à prendre*, as the doctrine upon which the Statutes

(*t*) See *e.g.*, *Titchmarsh v. Royston Water Co., Limited* (1900), 81 L. T. 673, where it was held that a right of way of necessity did not arise because on one side of the land the means of access could be made, although at great expense.

(*u*) See p. 15, *ante*.

(*x*) As to implied grants of the easement of support, see pp. 79, 83 *et seq.*, *post*.

(*y*) An easement of support is not, in general, an easement of necessity (see *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557) ; but under certain circumstances it will be so regarded (see *Richards v. Rose* (1853), 9 Ex. 218 ; *Shubbrook v. Tufnell* (1882), 46 L. T. 886 ; *Howarth v. Armstrong* (1897), 77 L. T. 62).

(*z*) *Wheeldon v. Burrows* (1879), 12 Ch. D. 31 [C. A.] ; *Ray v. Haseldine*, [1904] 2 Ch. 17. As to light easements generally, see p. 24, *post*.

of Limitation bears to corporeal real property. Under both doctrines a title is acquired to property by long enjoyment. We shall now examine both these doctrines, and reserve the subject of prescriptive claims to easements until we have dealt with prescription.

SECTION 4.—TITLE BASED ON LONG POSSESSION.

Title Based on Long Enjoyment.—It is a long established and well recognised principle of law that possession of property long enjoyed ought, if possible, to be clothed with legal right (*a*). This is the policy upon which the several Statutes of Limitation with regard to land, and the doctrine of prescription, are respectively based. But the principle of limitation of actions for the recovery of land and the doctrine of prescription operate upon different subject-matter, and operate in different ways.

Limitation.—The distinction between limitation and prescription, which in some cases becomes very fine, can in the generality of cases be preserved without difficulty. The title to land is evidenced by documentary testimony of the rights of parties (*b*). But if the rightful owner allows another to enter and take possession and remain thus in possession for twelve years from the time when the former first acquired the right to enter or commence an action, the rightful owner is debarred by statute from rightful entry or from bringing his action. This statutory bar is “limitation.” The bar operates against the enforcement of the dispossessed claimant’s remedy.

The operation of the Statutes of Limitation in respect of land is often of the greatest importance where disputes arise as to the rights of adjoining owners in respect of their boundaries. In such disputes one party may establish the inclusion of a marginal strip abutting on the land of

(*a*) See *Philipps v. Halliday*, [1891] A. C. 228, at p. 231; *Kingston-upon-Hull Corporation v. Horner* (1774), 1 Cowp. 102, at p. 110.

(*b*) See p. 217, *post*.

which he is in undisturbed and admitted rightful possession, such inclusion being clear upon the documentary evidence of his title, yet notwithstanding this his neighbour may be able to show that for the requisite statutory period the latter owner has been in possession of the marginal strip, and may thereby establish his right to the disputed strip under the Statutes of Limitation (*e*).

By the Real Property Limitation Act, 1874 (*d*), it is provided that no person shall make an entry, or distress or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit shall have first accrued to the person making or bringing the same (*e*).

The right to make an entry or distress, or bring an action to recover any land or rent is deemed to accrue when the person being in possession or in receipt of the profits of the land is either dispossessed or discontinues possession or receipt (*f*). If a written acknowledgment of title signed by the person in possession be given, time runs from the giving of such acknowledgment (*g*). There are divers savings in favour of persons under the disabilities of infancy and lunacy at the time when the right of entry or action first accrues.

The facts of possession, of dispossession, and of discontinuance of possession are frequently in issue in cases of boundary disputes where one party seeks to establish a title under the Statutes of Limitation.

(*e*) See *e.g.*, *Marshall v. Taylor*, [1895] 1 Ch. 641.

(*d*) 37 & 38 Vict. c. 57.

(*e*) *Ibid.* s. 1.

(*f*) 3 & 4 Will. 4, c. 27, s. 3.

(*g*) 3 & 4 Will. 4, c. 27, s. 14; 37 & 38 Vict. c. 57, s. 9.

In deciding these questions the nature of the property in dispute must be considered (*h*). There is no discontinuance of possession by reason of absence of use and enjoyment where the land is not capable of use and enjoyment (*i*). The fact of possession is established by proof of unequivocal acts of ownership. Sometimes both parties prove acts of ownership on the disputed land. This may be met by the hypothesis that one party owns the soil and the other enjoys an easement over it (*k*).

Where disputes arise as to the ownership of marginal strips, and one party shows that he or his predecessors in title have long exercised acts of ownership upon the disputed land, but it cannot be shown at what time the actual dispossession of the other or his predecessors in title took place, dispossession or discontinuance of possession on their part will be presumed at, or prior to, the commencement of the possession of the person shown to have exercised acts of ownership (*l*).

Prescription.—Incorporeal rights, such as easements and *profits à prendre*, are not susceptible of physical possession. Ownership of such rights can only be evidenced by acts of enjoyment. Where, therefore, a man has for many years exercised privileges of this description he is regarded as being as it were in possession of the right. As the law leans strongly towards quieting titles, when it is found that an act has been often repeated by the owner of property or his predecessors upon adjoining land belonging to others, and where the owners of that adjoining land have for years abstained from exercising their rights, and such abstinence has afforded an advantage to the neighbouring property, the law will presume, where the

(*h*) *Leigh v. Jack* (1879), 5 Ex. D. 264, at p. 274 (COTTON, L.J.); *Marshall v. Taylor*, [1895] 1 Ch. 641, at p. 645 (LORD HALSBURY). See also p. 33, *post*.

(*i*) *Leigh v. Jack*, *supra*, at p. 274. See also, p. 33, *post*.

(*k*) *Philpot v. Bath*, [1905] W. N. 114.

(*l*) See *Rains v. Buxton* (1880), 14 Ch. D. 537, at p. 539.

circumstances admit of such a presumption, that the right was exercised under, or the abstinence was due to, some grant previously made by a competent grantor to a competent grantee. A great number of easements and rights of a similar nature are claimed and established under this principle.

Development of the Doctrine of Prescription.—Space does not admit of a close examination into the historical development of the doctrine of prescription, at the same time, however, as prescriptive claims constantly occur in boundary cases, it seems desirable to state briefly the general outlines of that development (*m*).

1. *Immemorial Prescription.*—Our law, in common with many other judicial systems, has from early times recognised the principle that where a man has been in enjoyment of a right for many years, and where no other explanation can be given of his enjoyment except that it is rightful, and, therefore, must have originated in a due and proper manner, he ought to be supported by the law assuming a rightful origin, that is to say, a valid grant of the right by a competent grantor to a competent grantee. It being necessary to place some limit upon the length of time throughout which enjoyment of the right had to be shown, an epoch known as the commencement of legal memory was adopted for that purpose. By an unfortunate accident the date for the commencement of legal memory was taken to be a fixed date, viz., the first year of the reign of Richard the First, A.D. 1189. This date still remains in law the date for the commencement of legal memory, and where immemorial prescription is set up, even nowadays the claim is liable to be defeated by the

(*m*) The reader is referred for a fuller account of the successive stages in the development of the law of prescription to Combe's *Law of Light* (1911), pp. 130 *et seq.* See also the First Report of the Real Property Commissioners, p. 51; Herbert's *History of the Law of Prescription* (1891).

opponent proving that at some date since 1189 there was a time when the right could not have existed (*n*).

2. *Presumptive Prescription*.—The inconveniences of a fixed date, which increased by lapse of time, were mitigated to some extent by the introduction of the legal presumption which was said to arise where a right was shown to have been long exercised and enjoyed, viz., that that right had in fact been exercised and enjoyed in fact from 1189. This presumption appears to have been freely used and to have been favoured by the courts (*o*). This to some extent mitigated the inconveniences arising from the fixed date, but it still remained possible to defeat the claim by showing that at some period since 1189 the right could not in fact have existed (*p*).

3. *Presumed Grant since 1189*.—This state of affairs led to the introduction of a new form of prescription, which appears to date from the early sixteenth century (*q*). When a right was shown to have been long enjoyed, but it was also shown that it could not have existed in 1189, the courts came to uphold the claim upon the presumption that the right had been validly created since 1189 (*r*).

The tendency from this time onwards was to shorten the length of time during which user had to be shown to raise this presumption of a grant.

4. *The Twenty Years Rule*.—A further development in the law of prescription occurred in the seventeenth century, when the so-called twenty years rule was adopted in analogy to the twenty years period of limitation for writs of right contained in the Statutes of Limitation (*s*).

(*n*) See *e.g.*, *Norfolk (Duke) v. Arbutnot* (1880), 5 C. P. D. 390.

(*o*) First Report of the Real Property Commissioners, p. 51.

(*p*) *Ibid.*

(*q*) See *Bedle v. Beard* (1606), 12 Co. Rep. 5.

(*r*) *Dalton v. Angus* (1881), 6 App. Cas. 740, at p. 811.

(*s*) *Dalton v. Angus*, *supra*, at p. 812 (Lord BLACKBURN).

Doubts and difficulties surrounded this form of prescription. Judges differed in their conception of the proper mode of applying this fictitious analogy. Some regarded the proof of twenty years' enjoyment equivalent to twenty years' possession, and therefore a bar (*t*). Others considered that twenty years' user had no peculiar efficacy in itself, and that such evidence was evidence from which the jury might or might not presume a lost grant of the right according to their actual belief or disbelief in such a grant (*u*). Even at this day the precise effect of twenty years' user is not a matter upon which authorities agree (*v*). But the best opinion appears to be, and to have been, this—that twenty years' enjoyment of the right, if such user and enjoyment was of the nature essential to prescriptive claims (*y*), will of itself entitle the claimant to the right, and that no belief in the actual existence of a former grant is material to the question (*z*); but that such user is not effective where it can be shown that no valid grant could ever have been made (*a*). The doctrine is indeed the doctrine of estoppel by omission on the part of the servient owner.

At the end of the eighteenth century, and during the first three decades of the nineteenth century, it was

(*t*) See *Lewis v. Price* (1761), 2 Wms. Saund. 175 a (note); *Cross v. Lewis* (1824), 2 B. & C. 686.

(*u*) See the First Report of the Real Property Commissioners, p. 51.

(*x*) See the divers judgments and opinions delivered in the House of Lords in *Dalton v. Angus* (1881), 6 App. Cas. 740.

(*y*) As to the essential characteristics of prescriptive user, see p. 26, *post*.

(*z*) *Dalton v. Angus*, *supra*.

(*a*) *Rochdale Canal Co. v. King* (1849), 14 Q. B. 122; *Rochdale Canal Co. v. Radcliffe* (1852), 18 Q. B. 287. See also *Att.-Gen. v. Great Northern Rail. Co.*, [1909] 1 Ch. 775; *Staffordshire and Worcestershire Canal Co. v. Birmingham Canal Navigation Co.* (1866), L. R. 1 H. L. 254; *Roberts v. James* (1903), 89 L. T. 282; *Neaverson v. Peterborough Rural District Council*, [1902] 1 Ch. 557.

the practice to plead with great particularity the notional contents of the lost grant, even the names of the parties and many material dates were pleaded, although the pleader and probably nobody else had ever seen the deed (*c*). This highly artificial method of procedure became to be looked upon as a gross scandal, and this fact coupled with the strain which the system was said to impose upon the consciences of juries led to the passing of the Prescription Act, 1832 (*d*).

Prescription Act, 1832.—This Act (*e*), in effect, enacted that where a *profit à prendre* has been enjoyed without interruption by a person claiming right thereto for thirty years, a claim to the right can be defeated merely by showing that enjoyment first commenced at a time prior to the commencement of the thirty years, and that when the right has been enjoyed for sixty years the right is to be deemed indefeasible, unless the enjoyment has been had under some consent or agreement in writing (*f*).

Similar provisions were made with regard to easements, but the periods of twenty and forty years were, in the case of easements, substituted for the respective periods of thirty and sixty years (*g*).

With regard to the easement of light special provisions were made to the effect that when light has been enjoyed for twenty years without interruption, the right thereto is to be deemed indefeasible, unless it has been enjoyed by some consent or agreement in writing (*h*).

The respective periods mentioned in the Act are periods next before some suit or action in which the claim is brought into question, and no interruption is to be deemed such within the meaning of the Act unless acquiesced in

(*c*) First Report of the Real Property Commissioners, p. 51.

(*d*) See *Bright v. Walker* (1834), 1 C. M. & R. 211, at pp. 217, 218.

(*e*) 2 & 3 Will. 4, c. 71.

(*g*) *Ibid.*, s. 2.

(*f*) *Ibid.*, s. 1.

(*h*) *Ibid.*, s. 3.

for one year after the party interrupted has notice of it and of the person interrupting (*i*).

Except in cases where the Act declares the claim to be indefeasible, the time during which the alleged servient owner is an infant, idiot, *non compos mentis*, *jème covert*, or tenant for life, or during which an action is pending, is excluded in the computation of the periods (*k*).

In computing the period of forty years mentioned above, the time during which the alleged servient tenement is held for an estate for life or under a term of years exceeding three, is to be excluded if the claim be resisted by the reversioner within three years from the determination of that estate or term (*l*).

Present and Subsisting Modes of Prescribing.—We have given a short account of the development of prescription, and have pointed out the several successive stages in that development (*m*). Each stage as a separate method of prescribing, it is believed, still subsists: at any rate, the following points are clearly covered by authority. First, the Prescription Act, 1832, did not abolish all the former methods of prescribing (*n*); secondly, claims by immemorial prescription are now frequently successful (*o*); thirdly, although it may be proved that the right claimed did not exist in 1189, a grant of the right since that date may now be presumed (*p*); fourthly, the proof

(*i*) *Ibid.*, s. 4.

(*k*) *Ibid.*, s. 7.

(*l*) *Ibid.*, s. 8. This section only applies to the forty years period and not to the twenty years period. See *Palk v. Skinner* (1852), 18 Q. B. 568.

(*m*) See p. 21, *ante*.

(*n*) *Dalton v. Angus* (1881), 6 App. Cas. 740, at p. 814; *Aynsley v. Glover* (1875), L. R. 10 Ch. App. 283, at p. 285; *Onley v. Gardiner* (1838), 4 M. & W. 496, at p. 501.

(*o*) See *e.g.*, *Aynsley v. Glover*, *supra*. See also *Onley v. Gardiner*, *supra*.

(*p*) *Hulbert v. Dale*, [1909] 2 Ch. 570.

of twenty years' enjoyment of a privilege or accommodation, at any rate in the case of support for buildings, has a peculiar efficacy (*q*); fifthly, that all the foregoing methods of prescribing may be pleaded alternatively with the Prescription Act, and that, although the prescription may fail under the statute, the claim may be successful under any one of the foregoing methods of prescription (*r*).

The tendency of the courts in dealing with claims under a lost modern grant is, however, to allow actual belief or non-belief in the former existence of the grant to outweigh the artificial rule of the efficacy of twenty years' user; and doubts have recently been expressed whether this method of prescribing ought now to be regarded as effective.

Essentials of Prescriptive Enjoyment.—Enjoyment or user of an alleged right must (except in the case of light claimed under the Prescription Act, 1832 (*s*)), be enjoyment “as of right” (*t*). That is to say, it must be open and not had by stealth (*u*); it must be had without duress or violence (*x*); it must not have been by the licence of the owner of the servient tenement (*y*). Where the enjoyment has been due to the mistaken view of both parties as to their respective rights, there is no enjoyment

(*q*) See *Dalton v. Angus* (1881), 6 App. Cas. 740.

(*r*) *Aynsley v. Glover*, *supra*.

(*s*) See *Truscott v. Merchant Tailors' Co.* (1856), 11 Ex. 855. See also *Combe's Law of Light* (1911), p. 207 *et seq.*

(*t*) Co. Litt. 113 b.

(*u*) Co. Litt. 113 b.

(*x*) Co. Litt. 113 b.

(*y*) If the alleged servient owner can, whether the alleged dominant owner likes it or not, put a stop to the alleged easement, there is no easement, for the very idea of right which necessarily underlies an easement is negatived. See *per* FARWELL, J., in *Burrows v. Lang*, [1901] 2 Ch. 502, at p. 510. See also Co. Litt. 113 b; *Bright v. Walker* (1834), 1 C. M. & R. 211, 219; *Tickle v. Brown* (1836), 4 Ad. & E. 369, 382, 383; *Plasterers' Co. v. Parish Clerks' Co.* (1857), 6 Ex. 630; *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229; *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165, 171; *Whitmores (Edenbridge), Limited v. Stanford*, [1909] 1 Ch. 427.

as of right (*z*). Further, the user or enjoyment must be continuous (*a*). Often the very nature of the right claimed does not allow of continuous user or enjoyment, *e.g.*, where the alleged right is to go upon the servient tenement at long intervals of time (*b*). The question of continuity must, therefore, be considered by reference to the nature of the right alleged (*c*). Further, the user or enjoyment must have been capable of interruption (*d*).

Occasions when Prescriptions fail.—There can be no prescription where the terms of the grant are known (*e*), nor where there was not a competent grantor (*f*), nor any competent grantee (*g*); for every prescription presupposes a grant (*h*). For this reason also, no prescriptive claim can succeed an alleged right which could not have formed the subject-matter of a grant (*i*). A prescription cannot be made which has for its hypothesis either a grant by a limited owner (*k*), or a grant to a limited owner (*l*), for the whole theory of prescription is based on the presumed grant of an absolute owner of the servient tenement to an absolute owner of the dominant tenement (*m*).

(*z*) *Chamber Colliery Co. v. Hopwood* (1886), 32 Ch. D. 549; *Campbell v. Wilson* (1803), 3 East, 294, at pp. 301, 302.

(*a*) *Moore v. Rawson* (1824), 3 B. & C. 332; *R. v. Chorley* (1848), 12 Q. B. 515.

(*b*) See *Hollins v. Verney* (1884), 13 Q. B. D. 304.

(*c*) *Hollins v. Verney*, *supra*.

(*d*) *Sturges v. Bridgman* (1879), 11 Ch. D. 852 [C. A.].

(*e*) *Gardner v. Hodyson's Kingston Brewery Co.*, [1903] A. C. 229, at p. 239 (Lord LINDLEY).

(*f*) *Rochdale Canal Co. v. Radcliffe* (1852), 18 Q. B. 287, at p. 315; *Barker v. Richardson* (1821), 4 B. & Ald. 579.

(*g*) 2 Bla. Com. 265. Cf. *Goodman v. Saltash Corporation* (1882), 7 App. Cas. 633.

(*h*) *Gardner v. Hodyson's Kingston Brewery Co.*, [1903] A. C. 229; *Lockwood v. Wood* (1844), 6 Q. B. 50, at p. 64.

(*i*) 2 Bla. Com. (1778), 265.

(*k*) *Kilgour v. Gaddes*, [1904] 1 K. B. 457, at pp. 466, 467. Cf. *Bright v. Walker*, *supra*, at p. 221.

(*l*) *Kilgour v. Gaddes*, *supra*, at pp. 466, 467.

(*m*) *Kilgour v. Gaddes*, *supra*, at p. 465.

CHAPTER II.

WATER BOUNDARIES.

SECT.	PAGE
1.— <i>The Sea</i>	28
2.— <i>Inland Waters</i>	39
3.— <i>Rights and Obligations of Riparian Owners</i> ...	50
4.— <i>Rights of Fishing in Non-tidal Waters</i> ...	58
5.— <i>Sea Walls and River Embankments</i> ...	62

Scheme of the Chapter.—The subject of water boundaries may be conveniently divided and treated under several heads. In the first section of this Chapter we shall treat of the sea, including the sea-bed and foreshore. In the second section we shall deal with inland waters, including rivers and waterways, navigable and non-navigable, tidal and non-tidal (*a*). In the third section we shall deal with the rights of riparian owners (*b*). In the fourth with rights of fishing in non-tidal waters (*c*). We shall devote the fifth section to a consideration of embankments and natural defences which protect land from the inroads of water (*cc*).

SECTION 1.—THE SEA.

Definitions.—As the terms “sea-bed” and “foreshore” will be found to recur frequently in the course of this Chapter, and as these terms—more particularly the latter—have acquired a legal significance, it is well to commence by defining them.

The *sea-bed*, in the primary sense of the term, is used to denote the land always covered by the sea. The sea-bed extends into bays, creeks, and estuaries ; but in the

(*a*) See p. 39, *post*.

(*b*) See p. 50, *post*.

(*c*) See p. 58, *post*.

(*cc*) See p. 62, *post*.

mouths of tidal rivers the definition is generally laid aside for a more particular phrase. The term "sea-bed," in strictness, also includes that part of the shore which is only occasionally laid bare at very low tides. The sea-bed stretches seawards from the seaward limits of the foreshore (*d*).

The *foreshore* is that part of the shore which stretches between the sea-bed landwards to the mark of high water reached by ordinary tides occurring between the spring and neap tides, and which is alternately covered and left dry by the flux and reflux of the tide (*e*).

It will be observed that, from the nature of the case, the precise limits of both the sea-bed and the foreshore can seldom be accurately ascertained.

Ownership of the Soil of the Sea-bed.—It appears to be clear that the soil of the sea-bed, at any rate for some distance below low-water mark, is vested in the Crown (*f*). It is possible that the extent of this ownership is confined to three miles from the shore. The Crown's ownership of the sea-bed is subject to certain beneficial rights, such as

(*d*) See *Gann v. Free Fishers of Whitstable* (1865), 11 H. L. Cas. 192; *Lord Advocate v. Wemyss*, [1900] A. C. 48.

(*e*) At one time doubts appear to have existed as to the landward limits of the foreshore, and passages are to be found in some old authorities to the effect that the foreshore extends from the sea-bed to the mark of the high spring tide (see *e.g.*, *R. v. Gee* (1859), 1 E. & E. 1068, at p. 1070); but it is now well settled that the landward limit of the foreshore is the line reached at high water by an ordinary tide occurring between the spring and neap tides (*Att.-Gen. v. Chambers* (1854), 4 De G. M. & G. 206, at p. 216; *Blundell v. Catterall* (1821), 5 B. & Ald. 268, at p. 292; *Lowe v. Govett* (1832), 3 B. & Ad. 863; *Mellor v. Walmesley*, [1905] 2 Ch. 164. See also *Ilchester (Earl of) v. Raishleigh* (1889), 61 L. T. 477; *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139.

(*f*) See *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139, at p. 166, *per* PARKER, J.; *Gann v. Free Fishers of Whitstable* (1865), 11 H. L. Cas. 192; Hale, *De Jure Maris*, pp. 12, 25; *Constable's Case* (1601), 5 Co. Rep. 106 a; *The Queen v. Keyn* (1876), 2 Ex. D. 63, at p. 125 (BRETT, L.J.); *Lord Advocate v. Wemyss*, [1900] A. C. 48.

the right to navigate and to fish over the sea-bed (*g*). It has been said that there is no reason why the Crown's ownership should not be a beneficial ownership alienable by the Crown (*h*); but this much is clear, that, except possibly where there is a good consideration moving to the public, the Crown's alienation of the sea-bed cannot operate in derogation of the public rights of navigation and fishery (*i*).

Public Rights in respect of the Sea-bed.—The rights of the public over the sea-bed seem to be limited to the right of fishing and to the right of navigation, and to the ancillary rights incident thereto, such as the right of anchoring (*k*). They do not include the right of shooting wild fowl (*l*).

Ownership of the Foreshore.—According to the theory of English law, the foreshore is vested in the Crown (*m*).

(*g*) *Gann v. Free Fishers of Whitstable*, *infra*.

(*h*) *Fitzhardinge (Lord) v. Purcell*, *infra*, at p. 167.

(*i*) *Fitzhardinge (Lord) v. Purcell*, *infra*, at p. 167; *Gann v. Free Fishers of Whitstable* (1865), 11 H. L. Cas. 192, at p. 207.

(*k*) *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139, at pp. 165, 166; *Brinckman v. Matley*, [1904] 2 Ch. 313, at p. 316; *Gann v. Free Fishers of Whitstable* (1865), 11 H. L. Cas. 192.

(*l*) *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139, at pp. 167, 168.

(*m*) *Gann v. Free Fishers of Whitstable* (1865), 11 H. L. Cas. 192; *Att.-Gen. v. Richards* (1793), Anstr. 603; *Scrutton v. Brown* (1825), 4 B. & C. 485, at p. 495; *Mellor v. Walmesley*, [1905] 2 Ch. 164, at p. 177; *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139, at p. 166. Mr. Moore points out that there is doubt as to the strictness of the Crown's legal title. He states that there is a presumption in favour of the Crown *upon a theory*, but a presumption in favour of the subject *upon the facts*. The same learned author alleges that the Crown never did and never intended to reserve the foreshore in any grants anterior to Elizabeth, and all the coast had been granted out long before that date. Further, that there is no instance of such a reservation in any grant of a manor subsequent to Elizabeth. (See Moore's *History of the Foreshore* (1888 ed.), p. 708, note (*l*)). This may be, but the theory is a highly convenient one and one which has been often recognised and acted upon by the courts.

This ownership is a beneficial ownership alienable by the Crown, so that a subject may set up his title by express grant from the Crown (*n*). Although it is well established that *prima facie* the ownership of foreshore is in the Crown, this is a mere presumption which may be rebutted by evidence of ownership in a subject (*o*). The rebuttal of the presumption may be effected either by the production of the actual grant to a predecessor in title of the subject claiming the foreshore (*p*), or by proof of acts and things upon which evidence of such a grant may be presumed (*q*). Grants of the foreshore to subjects are usually of considerable antiquity, for there are numerous statutory provisions operating as restraints upon alienation which have now subsisted for some centuries (*r*). It may be laid down that now alienation by the Crown generally takes the form of demising the foreshore for a term of years, an office usually performed by the Board of Trade, who are also empowered to settle disputes relating to the foreshore (*s*).

Public Rights over the Foreshore.—The public enjoy the right of fishing (*t*), and the right of navigation (*u*), and certain ancillary rights over the foreshore. These

(*n*) See *e.g.*, *Beaufort (Duke) v. Swansea Corporation* (1849), 3 Ex. 413; *Att.-Gen. v. Haumer* (1858), 31 L. T. 379.

(*o*) See *e.g.*, *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139; *Beaufort (Duke) v. Swansea Corporation* (1849), 3 Ex. 415; *Truro Corporation v. Rowe*, [1902] 2 K. B. 709.

(*p*) Generally, where the foreshore is found to be in private ownership it is taken to have passed to the grantee of a manor as parcel of the manor. See the cases cited in the last preceding note.

(*q*) *Att.-Gen. v. Emerson*, [1891] A. C. 649.

(*r*) *E.g.*, 1 Anne, st. 1, c. 7, s. 5; 34 Geo. 3, c. 75.

(*s*) See Coulson and Forbes' Law relating to Waters (1910), pp. 26, 27. See *e.g.*, *Liverpool and North Wales Steamship Co., Limited v. Mersey Trading Co., Limited*, [1909] 1 Ch. 209.

(*t*) *Blundell v. Catterall* (1821), 5 B. & Ald. 268, at p. 294; *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139.

(*u*) *Fitzhardinge (Lord) v. Purcell*, *supra*; *Blundell v. Catterall*, *supra*, at p. 294.

rights are rights paramount to the rights of the Crown's grantee, and no purported or alleged grant by the Crown can operate in derogation of the public rights (*x*), except, perhaps, where some consideration moves to the public (*y*).

The public rights are usually confined to enjoyment during the time when the tide covers the foreshore (*z*). But ancillary to the right of navigation a member of the public has, no doubt, a right to land on the foreshore in time of peril (*a*). But the public have no right of way over the foreshore when uncovered by the tide (*b*) ; nor of bathing upon the foreshore (*c*) ; nor of using the foreshore for the purpose of storing oysters (*d*), or shooting wild fowl (*e*) : nor of holding meetings or delivering lectures and sermons on the foreshore (*f*). It is doubtful whether any right exists in the public to cross the foreshore when uncovered by the tide, for the purposes of fishing (*g*).

Private Ownership of the Foreshore presumed from Long Possession.—Where a man and his predecessors in title have long been in possession of the foreshore, but no grant from the Crown can be proved, the subject's ownership will be presumed as founded on a valid ancient grant

(*x*) *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139,

(*y*) *Fitzhardinge (Lord) v. Purcell*, *supra*, at p. 167.

(*z*) *Fitzhardinge (Lord) v. Purcell*, *supra* ; *Blundell v. Catterall*, *infra*, at p. 294.

(*a*) *Brinckman v. Matley*, [1904] 2 Ch. 313, at p. 316 (BUCKLEY, J.), and at p. 327 (ROMER, L.J.) ; *Blundell v. Catterall*, *infra*, at p. 295 (HOLROYD, J.) ; Hale's *De Portibus Maris*, p. 53.

(*b*) *Blundell v. Catterall* (1821), 5 B. & Ald. 268.

(*c*) *Blundell v. Catterall*, *supra* ; *Brinckman v. Matley*, *supra*.

(*d*) *Truro Corporation v. Rowe*, [1902] 2 K. B. 709.

(*e*) *Fitzhardinge (Lord) v. Purcell*, *supra*.

(*f*) *Llandudno Urban Council v. Woods*, [1899] 2 Ch. 705.

(*g*) *Brinckman v. Matley*, *supra*, at p. 316. See Bro. Abr. tit. Customs, pl. 46 : "Fishermen may justify going on the land adjoining the sea to fish in the sea, for this is for the good of the commonwealth, affording sustenance to many persons, and is the common law."

from the Crown (*h*). There is a close resemblance between acts of user upon which prescriptive claims to incorporeal hereditaments are founded, and acts of ownership from which possession of the foreshore is inferred. The foreshore is land, and therefore not, in strictness, the subject-matter of prescription (*i*); yet the ordinary acts of ownership, such as working the land or building upon it, which in the case of dry land are common and familiar evidences of possession, are not exercisable over the foreshore. The acts of ownership from which ownership of the foreshore is presumed are necessarily controlled by the very nature of the foreshore, and which only admits of possession during a few hours in the day. The outstanding feature of acts of ownership on the foreshore is their referability to distinct rights not involving ownership of the soil, yet notwithstanding this the law may presume ownership of the soil upon proof of the exercise of such acts. Thus, the letting of fishing rights by the owners of a manor during a long period might reasonably be accounted for by the hypothesis that these owners enjoyed, as appurtenant to the manor, the right of fishing as a separate tenement and independently of the soil of the foreshore, and demised these rights to their parties. Again, the enjoyment of the right to wreckage may reasonably be accounted for by the hypothesis that this arose by reason of a former grant of the franchise of wreckage which would not necessarily involve ownership of the soil. But it seems that the enjoyment of fishing rights (*k*), and of letting fishing rights (*l*), and the exercise

(*h*) See *Fitzhardinge (Lord) v. Purcell*, *supra*; *Att.-Gen. v. Emerson*, [1891] A. C. 649; *Foster v. Warblington Urban District Council*, [1906] 1 K. B. 648.

(*i*) It has been said that land cannot be claimed by prescription (*Beauchamp (Earl) v. Winn* (1873), L. R. 6 H. L. 223, at p. 238). See p. 18, *ante*.

(*k*) *Att.-Gen. v. Emerson*, [1891] A. C. 649, at pp. 654, 655 (Lord HERSHELL).

(*l*) *Att.-Gen. v. Emerson*, *supra*.

of the right to wreckage (*m*), are all matters which go far towards establishing a title to the soil of the foreshore (*n*). It is not, however, to be understood from the foregoing observations that the enjoyment of fishing rights on the foreshore, the enjoyment of the right to wreckage, or the enjoyment of rights of these descriptions, is to be taken as conclusive evidence of the ownership of the soil of the foreshore; for such is not the case (*o*). We may add here, that the reason for presuming that a grant of the foreshore accompanied a grant of such rights as the rights of fishing and wreckage, apparently lies in the relative values of the right granted, and of the land over which the right was exercisable—the right granted being a right to the only fruits which partially-derelict land, like the foreshore, could bestow (*p*).

Acts of Ownership on the Foreshore.—Evidence of the following facts and of things done by the predecessors in title of the claimant to the soil of the foreshore tend to establish a title to the foreshore, the exercise of the right of fishing by means of kiddles (a long line of stakes driven into the ground to support nets) (*q*); demising of rights to fish by means of kiddles (*r*); the erection of breakwaters on the foreshore (*s*); the taking of drift seaware (*t*). But the weight of evidence of this kind depends

(*m*) *Att.-Gen. v. Jones* (1862), 2 H. & C. 347; *Chad v. Tilseel* (1821), 5 Moo. 192.

(*n*) Where the grant of fishing rights involves the right to place more or less permanent structures in the soil, this fact goes far towards establishing the ownership of the soil in the grantees. See *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139, at p. 152; *Att.-Gen. v. Emerson*, [1891] A. C. 649, at pp. 655, 656.

(*o*) See *Dickens v. Shaw* (1822), Moore's History and Law of the Foreshore (1888 ed.), 451, 709 note (*n*).

(*p*) See *Att.-Gen. v. Emerson*, *supra*, at p. 655.

(*q*) *Att.-Gen. v. Emerson*, [1891] A. C. 649.

(*r*) *Att.-Gen. v. Emerson*, *supra*.

(*s*) *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139, at p. 159.

(*t*) *Lord Advocate v. Young* (1887), 12 App. Cas. 544, at p. 553.

upon the circumstances of the case (*u*), for the evidence may be explained away, or its effect weakened by counter-vailing evidence of acts done by the opponent's predecessors in title (*x*).

Whether a Title to the Foreshore can be Acquired under the Statutes of Limitation.—It has been said that a title by possession of the foreshore may be acquired by a subject against the Crown under the Nullum Tempus Act (*y*); and that similarly a title to the foreshore may be acquired by a subject against a subject under the Statutes of Limitation (*z*). However this may be, it is obvious that the very nature of the foreshore renders it a matter of great difficulty to establish the fact that the rightful owner has been dispossessed or has discontinued his possession (*a*).

Ownership of Land Abutting on the Foreshore.—With regard to land abutting on the foreshore, the general presumptions and rules of ownership which govern land

(*u*) Thus, where cattle had been enlarged from time to time by the defendant and his predecessors in title upon the foreshore, and this practice had continued for upwards of sixty years, such evidence was not regarded by the court as potent evidence of ownership of the foreshore, which, from its nature, could not be protected from intrusion (*Att.-Gen. v. Emerson, supra*, at p. 655; *Att.-Gen. v. Chambers, infra*).

(*x*) See generally as to evidence of acts of ownership, p. 244, *post*.

(*y*) *Ex parte Alston* (1856), 28 L. T. 337.

(*z*) *Foster v. Warblington Urban District Council*, [1906] 1 K. B. 648, at p. 658.

(*a*) See *Philpot v. Bath*, [1905] W. N. 114. "If cattle," said Lord CHELMSFORD, in *Att.-Gen. v. Chambers* (1859), 4 De G. & J. 55, at p. 65, where the practice of occasionally enlarging cattle upon the foreshore was put forward as an act of ownership to prove actual possession, "are turned upon enclosed pasture-ground and placed there to feed from time to time, it is strong evidence that it is done under an assertion of right; but where the property is of such a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of preventing it, there, mere user is not sufficient to establish a right."

in general apply. The seaward limit of such lands is the mark reached by ordinary high tides (b).

Usually, however, an owner of land abutting on the foreshore allows a strip or margin of land, consisting generally of sand, gravel, stones or rock, to remain apparently derelict, refraining from building or expending money upon works which from their position would be liable to destruction at particularly high tides in stormy weather. Disputes often arise with regard to these margins or strips, not only by reason from the general abstinence of the owner from erecting structures or doing other works thereon, but also because these strips are very liable to increase or decrease from the natural causes which affect the landward limits of the foreshore.

The Shifting Limits of the Foreshore.—Where the sea gradually recedes so as to leave land formerly covered at ordinary high tides high and dry, or where it gradually advances so as to cover at such tides lands formerly not so covered, the landward limits of the foreshore also recede or advance as the case may be; and the ownership of the lands affected by this change will be determined according to the altered conditions (c).

(b) *Mellor v. Walmesley*, [1905] 2 Ch. 164.

(c) For this reason, the sea-bed and foreshore have been called a "shifting freehold." Blackstone considered that the reason for the rule of law that transmutation of ownership followed on the imperceptible change of sea boundary was to be found in the principle embodied in the legal maxim "*De minimis non curat lex*" (2 Bla. Com. 251), but a better explanation appears to be this, that there is a twofold reason, first, that that which cannot be perceived in its progress ought to be regarded as though it had never existed, and, secondly, that there is necessity for some rule of law for the permanent protection and adjustment of property. See *In re Hull and Selby Rail. Co.* (1839), 5 M. & W. 327, at pp. 332, 333, and the comments of Lord CHELMSFORD in *Att.-Gen. v. Chambers* (1859), 4 De G. & J. 55, at p. 68. See also *Mellor v. Walmesley*, [1905] 2 Ch. 164, at p. 173, where VAUGHAN WILLIAMS, L.J., said: ". . . the sea has gradually and by imperceptible degrees receded and has left uncovered a quantity of land. . . . It was not disputed that in such a case the land so gained goes to the person to whom the land belongs to which

But on the other hand, if by some violent effort of nature the sea suddenly recedes and leaves land derelict over which the tides no longer flow and reflow, the ownership in the land so left derelict is not affected by the change (*d*). It would appear that the test whether or not there is a transmutation of ownership by the recession of the sea, does not lie so much in the length of time during which the recession has proceeded, but rather in the degree of the imperceptibility of the change (*e*). Where the progress of accretion is not discernable, but the exact space between the old and the new limits can be clearly shown, it is open to doubt whether transmutation of ownership is effected by the change (*f*).

Where land adjoining the foreshore is subject by reason of an immemorial local custom to the exercise of rights *in alieno solo* in favour of a defined but fluctuating body or class of persons having reference to the proximity of the sea, those rights will continue to be exercisable upon land gradually accruing to the first-mentioned land, by reason of the gradual recession of the sea. In other words, with the shifting limits of the foreshore, the site upon which a customary right *in alieno solo* having reference to the proximity of the seashore is exercised, will shift also (*g*).

Encroachments of the Sea.—The converse of the rules above stated holds good where the sea, instead of receding,

the accretion is adjacent." The question of the transmutation of ownership following upon the shifting of a natural boundary will be found more fully discussed at pp. 44 *et seq.*, *post*.

(*d*) *R. v. Yarborough* (Lord) (1828), 2 Bli. (N.S.) 147, at p. 162.

(*e*) See *Att.-Gen. v. Chambers* (1859), 4 De G. & J. 55, at p. 71; *Scrutton v. Brown* (1825), 4 B. & C. 485, at p. 502.

(*f*) See *Hindson v. Ashby*, [1896] 2 Ch. 1, at p. 13, where LINDLEY, L.J., after reviewing the authorities, left this point for consideration and decision when it should arise. See also *Att.-Gen. v. Reere*, 1 T. L. R. 675; *Att.-Gen. v. Chambers*, 4 De G. & J. 55. See, further, on this subject, pp. 44 *et seq.*, *post*.

(*g*) *Mercer v. Denne*, [1905] 2 Ch. 538, at pp. 579, 584 [C. A.].

advances (*h*). If the advance is imperceptible, the ownership of the foreshore extends with the altered features of the tide mark (*i*), and the *primâ facie* title of the Crown, therefore, extends to the land covered by the flux and reflux of the tide (*k*).

On the other hand, where the advance is sudden, the ownership of the land newly covered by the sea is not affected by the change (*l*).

Whether the Foreshore is included in the Adjoining Parish.—There is a *primâ facie* presumption that the foreshore is not included in the adjoining parish (*m*). The same presumption applies in estuaries and the mouths of navigable rivers (*n*). But evidence may be adduced to show that the bed of a navigable river belongs to both, or exclusively to one of the adjoining parishes. Thus, a pier which rested on wooden piles fixed in the bed of a river between high and low-water mark, was adjudged to be within the parish, and liable to be rated to the relief of the poor (*o*). Again, a wet dock constructed on a portion of land reclaimed from the ooze or bed of a navigable tidal river was held to be intra-parochial, although the perambulations of the parishes abutting on other portions of the reclaimed land appeared to show that the rights of those parishes extended only to high-water mark. As it appeared, however, that in each of the

(*h*) The question of the transmutation of ownership following upon the shifting of a natural boundary will be found more fully discussed at pp. 44 *et seq.*, *post*.

(*i*) *In re Hull and Selby Rail. Co.*, *infra*.

(*k*) *In re Hull and Selby Rail. Co.* (1839), 5 M. & W. 327, at pp. 332, 333.

(*l*) See *Att-Gen. v. Reeve* (1885), 1 T. L. R. 675.

(*m*) *R. v. Musson*, 8 E. & B. 900 ; *R. v. Gee*, 1 E. & E. 1068.

(*n*) *Trustees of Duke of Bridgwater's Estates v. Surveyors of Highways of Bootle* (1866), L. R. 2 Q. B. 4 ; *McCannon v. Sinclair* (1859), 5 Jur. (N.S.) 1022 ; *Co. of Proprietors of Waterloo Bridge v. Cull* (1859), 5 Jur. (N.S.) 1288.

(*o*) *McCannon v. Sinclair*, *supra*.

parishes considerable tracts which had been reclaimed from the ooze or bed of the river were rated to the poor rate, the presumption of parochiality arising from payment of these rates was considered to outweigh the contrary presumption arising from the perambulations (*p*).

SECTION 2.—INLAND WATERS.

Classification of Inland Waters.—Inland waters may be classified in several ways. They may be divided into tidal and non-tidal waters; into navigable and non-navigable waters; natural and artificial waters.

There are important distinctions between each of the classes in these three several classifications; and it will be convenient to state in a very brief manner the chief reasons for these classifications.

A tidal river partakes of the nature of the sea, and many of the presumptions and rules of law with regard to ownership and usufructuary and easemental rights apply in tidal rivers in the same manner as they apply to the sea, sea-bed and foreshore.

A non-tidal river, on the other hand, involves a very different code of presumptions and rules of law.

The classification of waters into navigable and non-navigable watercourses, which is unfortunately a somewhat common one, is highly unsatisfactory. Waters may be navigable but no rights of navigation may exist over them. Again, waters navigable by one kind of craft are frequently not navigable by other kinds of craft.

The third classification—that of waters into natural and artificial watercourses—is of the greatest importance.

Tidal Rivers.—When a river or an inlet of the sea is shown to be tidal, the ownership of the bed of the river

(*p*) *Ipswich Dock Commissioners v. Overseers of St. Peter's, Ipswich*, 7 B. & S. 310.

or inlet is *primâ facie* vested in the Crown (*q*). But a subject may own the bed under a grant, actual or presumed, from the Crown (*r*).

The foreshore of a tidal inlet or tidal river is similarly vested in the Crown or its grantees, but *primâ facie* in the Crown.

At the place where a river ceases to be tidal the rights of the Crown end and the rights of the public beyond that place are confined to rights of navigation if the river is in fact subject to a highway by water (*s*).

Public Rights in Tidal Rivers.—The public enjoy at common law the right of fishing in tidal rivers (*t*). The rights of the Crown and its grantees are subject to this right, and no purported grant in derogation of these rights can prejudice the public in the exercise of this right.

The public have also a right to navigate a tidal river, in so far as the river is tidal, and (of course) in so far as navigation is possible (*u*). This right of navigation extends over the whole of the river; so a riparian owner who attempts to erect any obstruction in the bed or foreshore may be restrained upon the ground that such obstruction is or would be a public nuisance (*x*).

(*q*) *Lyon v. Fishmongers Co.* (1875), L. R. 10 Ch. App. 679, at p. 689; *Constable's Case* (1601), 5 Co. Rep. 106 a; *Gann v. Free Fishers of Whitstable* (1864), 11 H. L. Cas. 192; Hale, *De Jure Maris*, pp. 12, 25; *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139.

(*r*) *Somerset (Duke of) v. Fogwell* (1826), 5 B. & C. 875, at p. 880. See *Fitzhardinge v. Purcell*, *supra*.

(*s*) It is obvious that from the nature of the case, great difficulty is experienced in ascertaining the exact spot where a river ceases to be tidal. See, as to this, *Reece v. Miller* (1882), 8 Q. B. D. 626; *Yorkshire Rivers Board v. Tadcaster District Council*, 97 L. T. 436.

(*t*) *Lyon v. Fishmongers Co.* (1875), L. R. 10 Ch. App. 679, at p. 689; *Fitzwalter's Case* (1674), 1 Mod. 105.

(*u*) *Lyon v. Fishmongers Co.*, *supra*, at p. 689.

(*x*) *Att.-Gen. v. Terry* (1874), L. R. 9 Ch. App. 423.

Non-tidal Rivers.—In non-tidal rivers very different rules and presumptions apply. When a river is not tidal no *primâ facie* right exists in the Crown either to the bed of the river or to the banks (*y*). The public have no right of fishing (*z*), nor can any member of the public prescribe for such a right (*a*).

A non-tidal river may or may not be subject to a public right of navigation. But although subject to a public right of navigation, the rights of the public never include a right of fishing (*b*).

Ownership of the Soil of Non-tidal Rivers.—*Primâ facie* the soil of the bed of a non-tidal river is vested in the owner of the banks (*c*), and if the opposite banks are owned by two different owners, these owners are *primâ facie* owners also of the bed of the river *ad medium filum aquæ* (*d*).

But in every case the rights of the ownership of the soil of the river are subject to such public rights of navigation as exist over the river (*e*).

(*y*) *Bristow v. Cormican* (1878), 3 App. Cas. 641, at p. 666; *Hindson v. Ashby*, [1896] 2 Ch. 1, at p. 9 (LINDLEY, L.J.).

(*z*) *Johnston v. O'Neill*, [1911] A. C. 552. See *Bristow v. Cormican*, *supra*; *Hargreaves v. Diddams* (1875), L. R. 10 Q. B. 582; *Hindson v. Ashby*, *supra*, at p. 9.

(*a*) *Smith v. Andrews*, *infra*.

(*b*) *Hargreaves v. Diddams*, *supra*; *Smith v. Andrews*, [1891] 2 Ch. 678; *Hindson v. Ashby*, *supra*, at p. 9.

(*c*) *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839, at p. 856; *Bristow v. Cormican* (1878), 3 App. Cas. 641, at p. 666 (Lord BLACKBURN); *Wright v. Howard* (1823), 1 Sim. & St. 190, at p. 203.

(*d*) *Wright v. Howard*, *supra*, at p. 203; *Blount v. Layard* (1888), cited in [1891] 2 Ch., p. 681 n.: *per* BOWEN, L.J., at p. 689 n. As to the presumption where there is an island in the river, see *Great Torrington Commons Conservators v. Sterens*, [1904] 1 Ch. 347, and *Menzies v. Breadalbane* (1901), 4 F. 55, Ct. of Sess. (a Scotch case).

(*e*) *Lyon v. Fishmongers Co.* (1876), 1 App. Cas. 662, at pp. 682, 683.

Conveyance of Land abutting on a Non-tidal River.

—Where the owner of a piece of land abutting upon a non-tidal river grants the land to another, there is a presumption that the soil of the river *ad medium filum aquæ* passes also to the grantee (*f*). This presumption may hold good even where the land is described as bounded by or abutting upon the river, or where the acreage is mentioned in the grant and such acreage does not include any part of the bed of the river (*g*). The presumption applies whether the land be copyhold, freehold or leasehold (*h*). To ascertain the position of the centre line of the river, the bed of the river is to be taken as including that portion of the soil of the river which is alternately covered and left dry, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the year without reference to the extraordinary freshets of the winter or spring or the extreme droughts of the summer or autumn (*i*).

Rebuttal of the Presumption.—This presumption may, however, be rebutted (*k*) either by the language of the grant (*l*), or by showing from the circumstances at the time of the grant, that it was not the intention of the parties to include the part of the river-bed (*m*). Thus, where at the time of the grant of the riparian land a several fishery (which had been demised from time to

(*f*) *Micklethwait v. Newlay Bridge Co.* (1886), 33 Ch. D. 133 [C. A.]; *Tilbury v. Silva* (1890), 45 Ch. D. 98, at pp. 108, 109; *Great Torrington Commons Conservators v. Stevens*, [1904] 1 Ch. 347. See also *Devonshire (Duke of) v. Pattinson*, *infra*.

(*g*) *Plumstead Board of Works v. British Land Co.* (1874), L. R. 10 Q. B. 16, at p. 24; *Dwyer v. Rich* (1871), Ir. Rep. 6 C. L. 144, at p. 149.

(*h*) *Tilbury v. Silva*, *supra*, at p. 109 (KAY, J.).

(*i*) *Hindson v. Ashby*, [1896] 2 Ch. 1, at p. 25 (A. L. SMITH, L.J.).

(*k*) *Dwyer v. Rich* (1871), Ir. Rep. 6 C. L. 144, at p. 149; *Devonshire (Duke of) v. Pattinson*, *infra*.

(*l*) *Dwyer v. Rich*, *supra*.

(*m*) *Devonshire (Duke of) v. Pattinson* (1887), 20 Q. B. D. 263.

time by the grantor to third parties as a separate tenement) was in lease, it was held that the presumption of the conveyance of the soil of the river *ad medium filum* was rebutted (*n*).

Public Rights of Navigation in Non-tidal Rivers.—

Public rights of navigation in non-tidal rivers stand upon a different footing to public rights of navigation in tidal waters. As we have seen at common law the public enjoy a right of navigation in all tidal waters (*o*), but in non-tidal waters the public have not “of common right” any such right. Public rights of navigation in non-tidal waters are based on dedication either actual or presumed (*p*). The measure of the public right depends on the extent of the dedication. Where the dedication is a presumed one the measure of the public right will depend on the user (*q*).

Effect of the Gradual Alteration in the River Bed.

—Where a river (*r*) or stream gradually changes its course so as to leave dry on the one hand lands formerly covered by the water, and, on the other hand, so as to encroach upon and cover land formerly uncovered by the water, the ownership of the land left uncovered accrues to the ownership of the adjacent land, and the ownership of the lands on either bank will be ascertained by reference

(*n*) *Devonshire (Duke of) v. Pattinson*, *supra*. See also *Hindson v. Ashby*, [1896] 2 Ch. 1, at p. 9.

(*o*) See p. 40, *ante*.

(*p*) See the cases cited in the next note.

(*q*) *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839; *Bourke v. Davis* (1889), 44 Ch. D. 110; *Simpson v. Att.-Gen.*, [1904] A. C. 476.

(*r*) As to the effect of the recession or encroachment of the sea upon the ownership of the sea-bed, foreshore and adjoining lands, see p. 36, *ante*. The question of the transmutation of ownership on the shifting of a natural boundary, will be found discussed more fully at pp. 44 *et seq.*, *post*.

to the altered features of the river or stream (*s*). Gradual accretions of land by recession of water, belong to the owner of the land gradually added to (*t*); and conversely, land gradually encroached upon by water ceases to belong to the former owner (*u*). The law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water (*x*).

Transmutation of Ownership following on the Shifting of a Water Boundary. — According to the definition which has been given to the term “alluvion,” viz., the gradual accumulation of alluvial deposit upon the shores of the sea or the banks of the river, which has continued so gradually and imperceptibly that no one can perceive how much is added in any moment of time (*y*), an imperceptible accretion means one which is imperceptible in its progress, and not one which is imperceptible after a lapse of time (*z*). The principle, however, by which alluvions or imperceptible accretions are given to the owner of the lands adjoining the seashore, appears to be inapplicable to the case where the original boundary line between the shore and the lands above can be clearly

(*s*) The proposition in the text appears to be justified by the decisions and dicta in the under-mentioned cases, but there is at present no direct authority upon the point. See *Ford v. Lacey* (1861), 7 Jur. (N.S.) 684, at p. 685; *Foster v. Wright*, *infra*; *Hindson v. Ashby*, [1896] 2 Ch. 1. See also *R. v. Yarborough (Lord)*, *infra*; *In re Hull and Selby Rail. Co.*, *infra*.

(*t*) *Foster v. Wright* (1878), 4 C. P. D. 438, at p. 446 (LINDLEY, J.). See also p. 36, *ante*; *R. v. Yarborough* (1824), 3 B. & C. 91.

(*u*) *Foster v. Wright*, *supra*, at p. 446. See also p. 36, *ante*; *In re Hull and Selby Rail. Co.* (1839), 5 M. & W. 327.

(*x*) *Foster v. Wright*, *supra*, at p. 446. See also p. 46, *post*.

(*y*) Instit. Bk. II. tit. 1, 20; *R. v. Yarborough (Lord)*, *supra*.

(*z*) Thus it has been held that although the quantity of land gained from the sea may eventually be very great, the Crown will not be entitled to it, if it was added insensibly and by slow degrees (*R. v. Yarborough (Lord)*, *supra*).

made out by marks on the coast, maps, evidence of witnesses, or by any other means. In such a case no reason can be assigned why the Crown should be deprived of its property ; and the reason which underlies the title by *alluvio* being excluded, that title itself ought also to be excluded, upon the maxim *Cessante ratione legis, cessat et ipsa lex*. In fact the reason of the difference between the law relating to title by alluvion and the law relating to title by dereliction (a) seems to be, that in the case of alluvion the original high-water mark has receded so slowly and imperceptibly that in course of time it has become impossible to say, with certainty, how far the shore formerly extended ; whereas in the case of dereliction no such difficulty presents itself, in consequence of the occurrence being recent and well known.

Lord HALE, speaking of alluvion, says : “ This *jus alluvionis* is *de jure communi* by law of England the king’s, viz., if by any marks or measures it can be known what is so gained : for if the gain be so insensible and undiscernible by any limits or marks that it cannot be known, *idem est none esse et non apparere*, as well in maritime increases as in the increases by inland rivers ” (b). Lord CHELMSFORD, after quoting this passage, observed (c) as follows : “ Lord HALE clearly limits the law of gradual accretions to the cases where the boundaries of the sea-shore and adjoining land are so undistinguishable that it is impossible to discover the slow and gradual changes which are from time to time accruing ; and when at the end of a long period it is evident that there has been a considerable gain from the shore, yet the exact amount of it, from the want of some mark of the original boundary line, cannot be determined. But where the limits are

(a) The term “ dereliction ” signifies a case where land is suddenly left dry by the sea or river. When this happens there is no transmutation of ownership. See p. 37, *ante*, and p. 46, *post*.

(b) Hale’s *De Jure Maris*, 14, 28.

(c) *Att.-Gen. v. Chambers*, 4 De G. & J. at p. 71.

clear and defined, and the exact space between these limits and the new high water line can be clearly shown, although from day to day, or even from week to week, the progress of the accretion is not discernible, why should a rule be applied which is grounded upon a reason which has no existence in the particular case?"

Referring to the law on this subject, LINDLEY, J., in a more recent case (*d*), said: "Our law may be traced back through Blackstone (*e*), Hale (*f*), Britton (*g*), Fleta (*h*) and Bracton (*i*), to the Institutes of Justinian (*k*), from which Bracton evidently took his exposition of the subject . . . It was contended that the doctrine does not apply to such rivers where the boundaries are not lost . . . Britton lays down as a general rule that gradual encroachments of a river enure to the benefit of the owner of the bed of the river; but he qualifies this doctrine by adding 'if certain boundaries are not found.' The same qualification is found in 22 Ap. pl. 93, which case is referred to in Hale. But, curiously enough, this qualification is omitted by Callis in his statement of the same case (see Callis, p. 51), and on its being brought to the attention of the court in *In re Hull and Selby Rail. Co.* (*l*), the court declined to recognise it, and treated it as inconsistent with the principle on which the law of accretion rests. Lord TENTERDEN's observations in *R. v. Yarborough* (*m*) are also in accordance with this view, and, although Lord CHELMSFORD in *Att.-Gen. v. Chambers* (*n*), doubted whether where the old boundaries could be ascertained the doctrine of accretion could be applied, he did not overrule the decision of *In re Hull*

(*d*) *Foster v. Wright* (1878), 4 C. P. D. 438, at p. 447.

(*e*) Vol. II., c. 16, pp. 261, 262.

(*f*) *De Jure Maris*, cc. 1, 6.

(*g*) Bk. II., c. 2.

(*i*) Bk. II., c. 2.

(*h*) Bk. III., cc. 2, 6.

(*k*) Inst. II., 1, 20.

(*l*) (1839), 5 M. & W. 327.

(*m*) (1824), 3 B. & C. 91, at p. 106.

(*n*) (1859), 4 De G. & J. at pp. 69—71.

and *Selby Rail. Co.* (o), which decided the point so far as encroachments of the sea are concerned.”

“Passages were cited,” said the same learned judge in the Court of Appeal in a more recent case (p), “from Bracton, Britton, Fleta and Hale *De Jure Maris* (cc. i. and vi.) and the Year Book 22 Ass. Jo. 106, pl. 93. to show that the doctrine of accretion does not apply where boundaries are well defined and known. This may be if the boundary on the water side is a wall, or something so clear and visible that it is easy to see whether the accretions, as they become perceptible, are on one side of the boundary or on the other. But I am not satisfied that the authorities referred to are applicable to cases of land having no boundary next flowing water except the water itself. The cases of *R. v. Yarborough* (q), affirmed by the House of Lords in *Gifford v. Yarborough* (Lord) (r), and *In re Hull and Selby Rail. Co.* (s), seem opposed to those authorities if applied to fluctuating water boundaries. The judgments in *Scrutton v. Brown* (t) point in the same direction. On the other hand, *Att.-Gen. v. Chambers* (u), seems the other way.”

It may be added, in connection with this subject, that by the rule of the civil law the boundaries of the *agri limitati* and *assignati*, respectively, were not altered by alluvion, as their limits were fixed, either by artificial boundary marks or by specific admeasurements; but that the *agri arcipinales* were subject to the ordinary rule relating to accretions, because these lands were not confined within fixed limits, but were bounded by reference to moveable features, viz., by such things as rivers (v).

(o) *Supra.*

(p) *Hindson v. Ashby*, [1896] 2 Ch. 1, at p. 13.

(q) (1824), 3 B. & C. 91. (s) (1839), 5 M. & W. 327.

(r) 5 Bing. 163. (t) (1825), 4 B. & C. 485.

(u) (1854), 4 De G. M. & G. 206; (1859), 4 De G. & J. 55.

(v) Cumin's Manual, 85; and see *Stewart v. Greenock Harbour Trustees*, 4 Sc. Sess. Cas. 283, 3rd ed.

Finally, it is submitted that the true solution of this troublesome question of accretion is to be found in the question—Yea or nay, was the boundary according to the intendment of the parties interested in its delimitation fixed by reference to a physical feature, subject to the incident of alteration through natural causes which is necessarily inherent in such a feature; or was it fixed by reference to the position of that physical feature as it then subsisted? Where the boundary consists of a physical feature susceptible to variation through natural causes, as in the case of the foreshore, it may readily be supposed that the boundary was fixed subject to such variations. Consequently, if land described as situate on and bounded by the seashore, be conveyed to a grantee, and the sea gradually recedes, the boundary of the land being the seashore, that boundary will advance as the sea recedes, and this may be the case even although the conveyance contain the superficial admeasurements of the land and such admeasurements do not include the newly accruing land (*y*). Similarly, it has been said that by a grant of the seashore the Crown would convey, not that which at the time of the grant is between the high and low-water marks, but that which from time to time shall be between these two termini (*z*). Similarly, where the plaintiff owned a several fishery (whether as an incident of his ownership of the bed of the river or independently of such ownership was not decided) and the river gradually altered its bed so that the defendant's land, which was formerly separated from the river by other land, became bounded in fact by the water, it was held that the defendant was not entitled to fish, in contravention of the plaintiff's rights of ownership, which were held to be limited by the shifting boundaries of the river (*a*).

(*y*) *Mellor v. Walmesley*, [1905] 2 Ch. 164.

(*z*) *Scrutton v. Brown* (1825), 4 B. & C. 485, at p. 498.

(*a*) *Foster v. Wright* (1878), 4 C. P. D. 438. In this case the progress and extent of the encroachment and alteration of the river could be clearly defined.

On the other hand, if there is a great, sudden and unforeseen variation in the situation of a physical feature serving as boundary to land, the probability of such a variation having been contemplated, is properly negligible. As it cannot be taken to be a variation of the kind contemplated, it cannot be said that the demarcation of the boundary was made subject to such an incident (*b*).

Inland Lakes.—The soil of an inland non-tidal lake is not vested in the Crown (*c*). Whether the soil be *primâ facie* vested in the riparian owners is open to doubt (*d*). The public may enjoy a right of navigation over an inland non-tidal lake, and where such a right exists the rights of ownership are necessarily subject to the public right. In exercise of the right of navigation any riparian owner may embark from his own lands as occasion may require (*e*). The public, however, have no right of fishing in an inland non-tidal lake (*f*)

(*b*) Thus, Lord HALE says: "If a fresh river between the lands of two lords or owners do insensibly gain on one or the other side, it is held, 22 Ass. 93, that the proprietary continues as before in the river. But if it be done sensibly and suddenly, then the ownership of the soil remains according to the former bounds" (Hale, *De Jure Maris*, c. 1, p. 5).

(*c*) *Johnston v. O'Neill*, [1911] A. C. 552, at pp. 577, 578.

(*d*) See *Mackenzie v. Bankes* (1878), 3 App. Cas. 1324, at p. 1338, where Lord SELBORNE discussing the law of Scotland said: "So far as relates to the *solum* or *fundus* of the lake, it is considered to belong in severalty to the several riparian proprietors, if more than one; the space inclosed by lines drawn from the boundaries of each property *usque ad medium filum aque* being deemed appurtenant to the land of that proprietor, exactly as in the common case of a river." See also *Bristow v. Cornican* (1878), 3 App. Cas. 641; *Marshall v. Ulleswater Steam Navigation Co.*, 3 B. & S. 732; *Bloomfield v. Johnson* (1867), Ir. R. 8 C. L. 89.

(*e*) *Marshall v. Ulleswater Co.* (1871), L. R. 7 Q. B. 166, at p. 172.

(*f*) *Johnston v. O'Neill*, *supra*.

SECTION 3.—RIGHTS AND OBLIGATIONS OF RIPARIAN OWNERS.

The rights of landowners to use and enjoy the amenities afforded by a river or stream which passes through or runs past their lands may be divided into (1) Natural rights, and (2) Accessorial rights (*g*).

What Constitutes a Riparian Owner.—The term “riparian owner” is applicable to any landowner whose land abuts upon a river or stream. His rights, in general, stand upon a different footing according to the nature of the river or stream, whether it be natural or artificial. Generally speaking, his rights in a natural river or stream are so-called natural rights, and in an artificial river or stream, accessorial rights. But accessorial rights may be acquired in a natural river or stream (*h*), and rights similar to natural rights in natural streams may be bestowed on artificial watercourses (*i*).

It is very important, for our purposes, to note that a riparian owner's rights are not founded upon any actual or presumed ownership of the soil of the bed of the stream or river, but upon the fact of his ownership of the bank washed by the stream, and because he has access to the water (*k*). A person's land must be, however, in

(*g*) As to the distinction between natural and accessorial rights, see p. 5, *ante*. See also Combe's Law of Light (1911), p. 2.

(*h*) See p. 55, *post*.

(*i*) *Sutcliffe v. Booth* (1863), 9 Jur. (N.S.) 1037; *Nuttall v. Bracewell* (1866), L. R. 2 Ex. 1. See also *Baily & Co. v. Clark, Son and Morland*, [1902] 1 Ch. 649, at p. 664 (VAUGHAN WILLIAMS, L.J.); *Whitmore (Edenbridge), Limited v. Stanford*, [1909] 1 Ch. 427.

(*k*) *Lyon v. Fishmongers Co.* (1876), 1 App. Cas. 662, at p. 673 (Lord CAIRNS), and at pp. 682, 683 (Lord SELBORNE); *Chase-more v. Richards* (1859), 7 H. L. Cas. 349; *Embrey v. Owen* (1851), 6 Ex. 353, at p. 369.

contact with the water to give him the rights of a riparian owner (*l*) ; but, on the other hand, the fact that there is not constant contact does not prevent him being regarded in law as a riparian owner (*m*). Thus, a man may be a riparian owner although the level of the water is subject to fluctuations, and at times the water is withdrawn from his boundary (*n*).

Riparian Owners' Natural Rights in Natural Watercourses.—The subsistence of the physical natural feature of a river or stream in relation to the lands abutting upon it is regarded in law as a natural incident of the lands, and the benefits derived from this incidence are recognised by the law. These benefits are bestowed by nature and are capable of enjoyment throughout the whole course of the stream, and every owner whose lands touch upon the stream has equal rights to enjoyment of these benefits (*o*). These rights arising from nature are said to be “natural rights” or “rights *ex jure naturæ*.”

A riparian owner's right, which is at variance with the natural rights, is an accessorial right, and must be based upon a grant, express, implied or presumed of that right, by the other riparian owners who are affected prejudicially by the exercise of the accessorial right, or by the predecessors in title of such other riparian owners (*p*).

(*l*) *Lyon v. Fishmongers Co.*, *supra*, at p. 683. Cf. *Nuttall v. Bracewell* (1866), L. R. 2 Ex. 1.

(*m*) *Lyon v. Fishmongers Co.*, *supra*, at p. 683.

(*n*) *Id.*, at p. 683. It will be observed, however, that if there are tidal fluctuations, the river will, as a rule, be tidal ; and that the rights of riparian owners are not of importance in the case of tidal rivers.

(*o*) *Lyon v. Fishmongers Co.* (1876), 1 App. Cas. 662, at p. 682 ; *Wood v. Waud* (1849), 3 Ex. 748, at p. 775 ; *Embrey v. Owen* (1851), 6 Ex. 353 ; *Sampson v. Hoddinott* (1857), 1 C. B. (N.S.) 590 ; *Sharp v. Wilson* (1905), 21 T. L. R. 679, at p. 680.

(*p*) *Sampson v. Hoddinott* (1857), 1 C. B. (N.S.) 590 ; *Sharp v. Wilson* (1905), 21 T. L. R. 679, at p. 680 (JOYCE, J.).

Every riparian owner has *ex jure naturæ* a right to have the water of a natural stream or river which touches upon his land come to him in its natural state without diminution or alteration ; but, as each owner whose lands are similarly placed throughout the whole course of the stream has a right to the usufruct of the water, each particular owner's enjoyment is perforce subject to the effect of the enjoyment of the others (*q*).

It will be convenient to treat of these natural rights as follows : First, with regard to user (in the sense of consumption) of the water ; secondly, with regard to the preservation of the flow ; and thirdly, with regard to the preservation of the natural state of the water.

(1) *Right to Consumption of Water*.—The purposes for which a riparian owner may use the water may be classified under two heads : (1) Ordinary or primary purposes connected with his tenement ; and (2) Extraordinary or secondary purposes.

The first category include the taking of water for culinary and domestic purposes (*r*), and for watering (*s*) and cleansing cattle. It has been said (*t*) that, in exercise of this right of taking water for these ordinary or primary purposes, a riparian owner may exhaust the water altogether, but it is respectfully suggested that this statement is to be treated with caution.

(*q*) *Embrey v. Owen* (1851), 6 Ex. 353, at p. 369 ; *Sampson v. Hoddinott* (1857), 1 C. B. (N.S.) 590, at p. 611 ; *Mason v. Hill* (1833), 5 B. & Ad. 1 ; *Kensit v. Great Eastern Rail. Co.* (1883), 23 Ch. D. 566, at p. 574.

(*r*) *McCartney v. Londonderry and Lough Swilly Rail. Co.*, [1904] A. C. 301, at p. 306 (Lord MACNAGHTEN) ; *Miner v. Gilmour* (1858), 12 Moo. 131 ; *Kensit v. Great Eastern Rail. Co.* (1883), 23 Ch. D. 566, at p. 574 (POLLOCK, B.).

(*s*) *McCartney v. Londonderry and Lough Swilly Rail. Co.*, *supra*, at p. 306 ; *Miner v. Gilmour*, *supra*.

(*t*) *McCartney v. Londonderry and Lough Swilly Rail. Co.*, *supra*, at p. 307.

With regard to the second category, viz., the extraordinary or secondary purposes to which a riparian owner may put the water, there is considerable difficulty in defining the exact limits of these purposes (*u*). Two conditions must, however, be satisfied. First, the user of the water must be reasonable (*x*); and, secondly, the purpose must be connected with the tenement (*a*). Whether the user be reasonable depends, at all events in some degree, on the magnitude of the stream (*b*).

Cases where user of water for these extraordinary purposes is held legitimate, are generally cases of diversion of water for irrigating adjoining land (*c*), or for driving water-wheels or turbines, or for condensing steam or other cooling purposes in connection with mills, factories, and similar works (*d*). It is to be observed that in these cases the return of the water to the stream or river, in substantially the same volume and state, is nearly always effected, and this return must be regarded as essential for the legitimacy of the user (*e*).

With regard to the quantum of the water which a riparian owner may, in exercise of his riparian rights,

(*u*) The difficulty of accurate definition of these rights was commented upon by Lord MACNAGHTEN in *McCartney v. Londonderry and Lough Swilly Rail. Co.*, [1904] A. C. 301, at p. 307, and by PARKE, B., in *Embrey v. Owen* (1851), 6 Ex. 353, at p. 372.

(*x*) *McCartney v. Londonderry and Lough Swilly Rail. Co.*, *supra*, at p. 307; *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1875), L. R. 7 H. L. 697, at p. 704 (Lord CAIRNS, C.).

(*a*) *McCartney v. Londonderry and Lough Swilly Rail. Co.*, *supra*, at p. 307. *Cf. Norbury (Earl) v. Kitchen* (1866), 3 F. & F. 292.

(*b*) *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.*, *supra*, at p. 704 (*per* Lord CAIRNS, C.).

(*c*) See *Embrey v. Owen* (1851), 6 Ex. 353; *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1875), L. R. 7 H. L. 697, at p. 704 (Lord CAIRNS, C.). And see *Sampson v. Hoddinott* (1857), 1 C. B. (N.S.) 590.

(*d*) *Kensit v. Great Eastern Rail. Co.* (1883), 23 Ch. D. 566.

(*e*) *McCartney v. Londonderry and Lough Swilly Rail. Co.*, at p. 307 (*per* Lord MACNAGHTEN).

actually exhaust for the extraordinary purposes mentioned above and connected with his tenement, and the maximum proportion which the exhausted quantity may lawfully bear to the bulk of the flowing water, there are few reported cases which throw any satisfactory light upon the subject. But the general result of the authorities appears to lead to the following conclusions, viz.: (1) that the actual exhaustion of *some* water for the extraordinary purposes mentioned above is legitimate, and therefore *per se* gives no right of action to any other riparian owner (*f*); (2) that the abstraction of water for extraordinary purposes, although connected with the tenement, is very much more jealously watched by the law than in the case of water taken for primary purposes (*g*); (3) that the question of the quantum, which can be legitimately exhausted by these extraordinary purposes, does not depend so much upon scientific computation as upon the practical and appreciable result upon the other riparian owners; and (4), that if there is a *sensible* effect upon the water of the stream the exhaustion of water is not lawful, although used in connection with the riparian owner's tenement and for any of the extraordinary purposes mentioned above (*h*).

(*f*) *Embrey v. Owen* (1851), 6 Ex. 353; *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.*, *infra*, at p. 704, where Lord CAIRNS, L.C., said "the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes . . . whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use."

(*g*) *McCartney v. Londonderry and Lough Swilly Rail. Co.*, [1904] A. C. 301; *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1875), L. R. 7 H. L. 697.

(*h*) Thus Lord MACNAGHTEN, in *McCartney v. Londonderry and Lough Swilly Rail. Co.*, *supra*, at p. 307, speaking of the user of water for extraordinary purposes by a riparian owner, said, "the purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and

(2) *Right to Preservation of the Flow.*—A riparian owner must not alter the flow of a river or stream so as to injure other owners. He may not dam the water so as to raise the level of the water upon the banks of other riparian owners (*i*).

(3) *Right to Freedom from Pollution.*—A riparian owner has also the right *ex jure nature* of having the water of the stream or river flow to him in its natural state of purity (*k*). In other words, no one may, without a grant express, implied, or presumed, foul or otherwise alter the nature of water of a natural watercourse (*l*). Thus, he cannot increase the temperature of the water (*m*), or convert soft water into hard (*n*).

Accessory Rights in Natural Watercourses.—Rights in natural watercourses may be acquired by riparian owners, which are at variance with the natural rights. These acquired or accessory rights are easements, and are founded on grant express, implied, or presumed (*o*).

Although a riparian owner may not *ex jure nature* use water for purposes other than those mentioned above, he may acquire an easement entitling him to make a use of the water which would otherwise be unlawful; thus, he may acquire an easement entitling him to interfere with

uses for those purposes substantially undiminished in volume and unaltered in character."

(*i*) *Wright v. Howard* (1823), 2 Sim. & St. 190, at p. 203.

(*k*) *Wood v. Waud* (1849), 3 Ex. 748, at p. 772; *Mason v. Hill* (1833), 5 B. & Ad. 1; *Goldsmid v. Tunbridge Wells Improvement Commissioners* (1865), L. R. 1 Eq. 161; L. R. 1 Ch. App. 349; *Crossley & Sons, Limited v. Lightowler* (1867), L. R. 2 Ch. App. 478.

(*l*) *Wood v. Waud*, *supra*, at p. 772; and see the cases cited in the last note.

(*m*) *Mason v. Hill*, *supra*.

(*n*) *John Young & Co. v. Bankier Distillery Co.*, [1893] A. C. 691, at p. 699.

(*o*) As to easements generally, see p. 6, *ante*. As to the acquisition of easements, see pp. 13 *et seq.*, *ante*.

the flow of the river (*p*), or he may acquire an easement entitling him to pollute the water (*q*).

It is of the essence of such easements that they exist for the benefit of the dominant tenement only. They are created for the benefit of the dominant owner, and consequently their exercise cannot operate to create a new right for the benefit of the servient owners. So, in the case of any other easement, the exercise of an easement of this kind may be discontinued if it becomes onerous, or ceases to be beneficial to the party entitled to it. Although its exercise may in fact operate as an indirect benefit to the servient owners, the latter have no right, nor can they acquire any right, by reason of which they can proceed against the owner of the dominant premises if he discontinues the exercise of his right (*r*).

Acquisition of Accessorial Water Rights.—Accessorial rights of this kind are acquired either (1) by express grant or by statute; (2) implied grant (*s*); or (3) by long user from which a grant is presumed under the principles of prescription (*t*).

(*p*) See *e.g.*, *Beeston v. Weate* (1856), 5 E. & B. 986, where an easement was established entitling the owner to dam a brook and to use the water so dammed for irrigation purposes; *Holker v. Porritt* (1875), L. R. 10 Ex. 59, where there was an easement to abstract water by pipes to a farm yard; *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), L. R. 6 Q. B. 578, where an Act of Parliament gave a canal company an easement of diverting the water from a brook for the purposes of their canal.

(*q*) *Bealey v. Shaw* (1805), 6 East. 208, at p. 214 (Lord ELLENBOROUGH); *Wright v. Williams* (1836), 1 M. & W. 77; *Crossley & Sons, Limited v. Lightowler* (1867), L. R. 2 Ch. App. 478; *Baxendale v. McMurray* (1867), L. R. 2 Ch. App. 790.

(*r*) *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), L. R. 6 Q. B. 578, at p. 587 (*per* COCKBURN, C.J.).

(*s*) See pp. 15 *et seq.*, *ante*.

(*t*) As to the doctrine of prescription generally, see pp. 20 *et seq.*, *ante*. See also *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), L. R. 6 Q. B. 578, at pp. 586, 587. A prescriptive right to pollute water can only be acquired by the continuance of a

In all cases of the acquisition of an easement in water, the grant, whether actual or implied or presumed, must have been made, or must be presumed to have been made, by all the riparian owners or their predecessors in title, whose natural rights in the stream or river are interfered with by the exercise and enjoyment of the easement.

Rights in Artificial Watercourses.—From the nature of the case, the natural rights of riparian owners do not *primâ facie* apply in the case of watercourses which are known to have been artificially constructed (*u*). Whereas in the case of a natural watercourse, riparian owners enjoy rights in respect of the water as a natural incident of their ownership of their land, in the case of an artificial watercourse, any right in respect of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought (*x*).

The rights of the owners of land through which an artificial watercourse passes are, in general, to be ascertained by reference to the circumstances under which the watercourse was made. Artificial watercourses are frequently made for the purpose of serving mills or for draining mines. In such cases it will not be readily assumed that the owners of the lands through which the water flows, were intended to take any benefit (*y*). Where watercourses are made for such particular and

perceptible amount of injury for twenty years (*Goldsmid v. Tunbridge Wells Improvement Commissioners* (1866), L. R. 1 Ch. App. 349).

(*u*) *Kensit v. Great Eastern Rail. Co.*, *infra*, at pp. 133, 134; *Burrows v. Lang*, [1901] 2 Ch. 502, at pp. 505, 506 (FARWELL, J.).

(*x*) *Rameshur Pershad Nararin Singh v. Koonj Behari Pattuk* (1878), 4 App. Cas. 121, at p. 126 (SIR MONTAGUE SMITH); *Kensit v. Great Eastern Rail. Co.* (1884), 27 Ch. D. 122, at p. 134 [C. A.].

(*y*) See *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), L. R. 6 Q. B. 578, at p. 587.

temporary purposes as these, no accessorial rights can be acquired by user and enjoyment in favour of third parties as against the party who made the watercourse or his successors in title (z).

On the other hand, however, an artificial watercourse may be made under circumstances which bestow upon the persons through whose lands the water runs all the rights of riparian owners in natural watercourses (a).

SECTION 4.—RIGHTS OF FISHING IN NON-TIDAL WATERS.

Classification of Fishery Rights in Non-tidal Waters.

—Fishery rights in non-tidal waters may be classified as follows: (1) Rights of fishing based on ownership of land and incident to such ownership *ex jure nature* (b), and (2) rights of fishing *in alieno solo* (c). The second category may be sub-divided into (1) several fisheries, and (2) fishery rights subsisting as rights exercisable in common.

No Public Right of Fishing in Non-tidal Waters.—

We have already dealt with the public rights of fishing in tidal waters (d). We have also pointed out that the public have no right of fishing in non-tidal waters (e),

(z) *Arkwright v. Gell* (1839), 5 M. & W. 203; *Burrow v. Lang*, [1901] 2 Ch. 502; *Wood v. Waul* (1849), 3 Ex. 748.

(a) *Sutcliffe v. Booth* (1863), 9 Jur. (N.S.) 1037; *Nuttall v. Brucewell* (1866), L. R. 2 Ex. 1. See also *Bailey & Co. v. Clark, Son and Morland*, [1902] 1 Ch. 649, at p. 664.

(b) This category includes rights of fishing enjoyed by riparian owners as owners of a part of the river or stream, and also rights of fishing enjoyed by the owner of the bed of the river or stream.

(c) This category includes rights of fishing enjoyed as a separate incorporeal hereditament apart from the ownership of the soil of the river. It also includes rights of fishing annexed to riparian lands where such lands are owned apart from the bed of the river.

(d) See p. 40, *ante*.

(e) See p. 41, *ante*; *Johnston v. O'Neill*, [1911] A. C. 552; *Hargreaves v. Diddams* (1875), L. R. 10 Q. B. 582; *Hindson v. Ashby*, [1896] 2 Ch. 1; *Smith v. Andrews*, [1891] 2 Ch. 678.

and that the fact that a particular non-tidal waterway is subject to a highway by water, does not give the public any right to fish (*f*).

Riparian Owners' Rights of Fishing.—Every landowner whose land is bounded by a non-tidal river or stream, or whose lands are intersected by such water, may fish in the water in so far as it flows over his land (*g*), provided he does not infringe the rights of grantees enjoying a right of fishing as a *profit à prendre* under a grant by him or any one of his predecessors in title.

This general right of landowners is based on the proprietorship of the bed or part of the bed of the river or stream (*h*), and is not, like a riparian owner's right to use water flowing past his land, based upon the mere access to the water.

Rights of Fishing where the Bed of the River is Owned separately to the Banks.—Where the bed of a non-tidal river is owned separately to the banks, the owner of the bed has, incidental to his ownership, a right of fishing; and he can exclude the riparian owners from fishing in the river (*i*). A riparian owner's right of fishing depends, as we have seen, not on his access to the river but on his ownership of the bed, or part of the bed, of the river. Consequently, if the bed of the river is not his, he cannot fish, although he enjoys rights to use the water (*k*).

(*f*) See p. 41, *ante*; *Hargreaves v. Diddams*, *supra*; *Hindson v. Ashby*, *supra*; *Smith v. Andrews*, *supra*.

(*g*) See *Ecroyd v. Coulthard*, [1898] 2 Ch. 358, at pp. 366, 371, 376; *Murphy v. Ryan* (1868), Ir. R. 2 C. L. 148.

(*h*) *Devonshire (Duke) v. Pattinson* (1887), 20 Q. B. D. 263, at p. 271; *Cooper v. Phibbs* (1867), L. R. 2 H. L. 149, at p. 165.

(*i*) *Devonshire (Duke) v. Pattinson* (1887), 20 Q. B. D. 263; *Foster v. Wright* (1878), 4 C. P. D. 438.

(*k*) As to a riparian owner's rights to use the water, see pp. 51 *et seq.*, *ante*.

Several Fishery.—A several fishery (when subsisting as a right *in alieno solo*) is a right owned by one or more persons, either as a right in gross (*l*), or a right appurtenant to land (*m*), entitling the owner or owners of the right to fish in water covering or flowing over another person's land ; which right subsists to the exclusion of the grantor of the right and his successors in title (*n*).

Common of Fishery.—A right of fishing subsisting as a right of common is a right, exercisable in common with others, of fishing in waters flowing over or covering the land of a third party (*o*). Such a right may subsist in connection with manorial customs, as where the copyholders enjoy the right by the custom of the manor (*p*).

“Free” Fishery.—The use of the term “free” fishery has led to considerable confusion. A learned writer upon the law of fisheries has pointed out that no satisfactory argument can be based upon the use of the terms *separalis piscaria* and *libera piscaria* as they are used indifferently in many ancient records (*q*), and with this opinion we respectfully concur, for the authorities seem to

(*l*) *The Fishery Case* (1610), Dav. Tr. 55. A several fishery in gross cannot be claimed under the Prescription Act, 1832 (*Shuttleworth v. Le Flemming* (1865), 19 C. B. (N.S.) 687).

(*m*) A several fishery cannot be appurtenant to a several pasture (*Edgar v. English Fisheries Special Commissioners* (1870), 23 L. T. 732). A fishery appurtenant to land must be limited in some way to the requirements of that land (*Chesterfield (Lord) v. Harris*, [1908] 2 Ch. 397, at pp. 410—412, 421).

(*n*) “A man may prescribe to have a *separalem piscariam* in such a water, and the owner of the soil shall not fish there” (Co. Litt. 122 a ; *Hanbury v. Jenkins*, [1901] 2 Ch. 401, at p. 411 ; *Malcolmson v. O’Dea* (1863), 10 H. L. Cas. 593 ; *Holford v. Bailey* (1850), 13 Q. B. 426, at p. 446).

(*o*) 2 Bla. Com. 34 ; *Bennet v. Costar* (1818), 8 Taunt. 183, at p. 187 ; *Solme v. Bullock* (1684), 3 Lev. 165. See also *Chesterfield (Lord) v. Harris*, [1908] 2 Ch. 397.

(*p*) *Tilbury v. Silva* (1890), 45 Ch. D. 98.

(*q*) Viz., Mr. Stuart A. Moore. See Moore on the History of the Foreshore (1888 ed.), p. 740, note (*d*).

establish nothing except that the term "free fishery" is a highly unsatisfactory one (*r*).

Presumption that the Owner of a Several Fishery Owns the Bed of the River.—There is a curiously anomalous presumption with regard to the ownership of a several fishery, which seems too well established to be doubted, although it has been criticised by eminent authorities. This presumption is as follows—that where a several fishery subsists it is presumed in the absence of rebutting evidence to the contrary that the owner of the several fishery is also the owner of the whole bed of the river so far as the several fishery extends (*s*). In other words, there is a presumption that a several fishery is not a several fishery *in alieno solo* (*t*). Where a person is shown to have exercised fishery rights of an exclusive nature, which must necessarily have been granted by the riparian owners or their predecessors in title, or originally by the common owner of the riparian lands and of the bed of the river, instead of presuming that the person so

(*r*) See the comments of WILLES, J., in *Malcolmson v. O'Dea* (1863), 10 H. L. Cas., at p. 593.

(*s*) *Holford v. Bailey* (1850), 13 Q. B. 426, at p. 444; *Att.-Gen. v. Emerson*, [1891] A. C. 649; *Ecroyd v. Coulthard*, [1897] 2 Ch. 554, at p. 570, affirmed, [1898] 2 Ch. 358; *Marshall v. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732; *Somerset (Duke) v. Fogwell* (1826), 5 B. & C. 875; *Hindson v. Ashby*, [1896] 2 Ch. 1; *Hanbury v. Jenkins*, [1901] 2 Ch. 401; *Beaufort (Duke) v. Aird & Co.* (1904), 20 T. L. R. 602.

(*t*) COCKBURN, C.J., criticised this presumption in *Marshall v. Ulleswater Navigation Co.*, *supra*. "It is admitted on all hands," said his lordship, at p. 748, "that a several fishery may exist independently of the ownership of the soil in the bed of the water. Why then should the grant of such a fishery be considered as carrying with it the property in the soil? . . . If the intention be to convey the soil, why not convey the soil at once, leaving the fishery (which is the accessory) to follow? Why grant the accessory that the principal may pass incidentally? The greater is justly said to comprehend the less; but this is to make the converse of the proposition hold good. A grant of land carries with it, as we all know, the minerals which may be below the surface; but who ever heard of a grant of the mineral carrying with it the general ownership of the soil?"

exercising the exclusive fishery rights or his predecessor in title obtained a grant of the right as a *profit à prendre*, the law presumes that he or they obtained a grant of the soil of the bed of the river, and that his exclusive fishery rights are rights incidental to his ownership of the bed and not rights subsisting as a *profit à prendre in alieno solo* (*u*).

It is said that the soil passes upon the grant of a piscary (*v*). However this may be, a condition precedent to such a transmutation of ownership is the ownership of the whole soil of the river in the grantor, and in the majority of cases the ownership does not subsist. Further, it is clear that a grant of a piscary does not pass the soil if there are any words in the grant which denote a contrary intention (*y*).

Boundaries of Several Fisheries in Non-tidal Waters.

—Where a non-tidal river divides two manors, each lord is *primâ facie* entitled to a moiety of the river and fishery (*z*). Where a non-tidal river divides two properties, the right of fishing is *primâ facie* in the adjoining proprietors *usque medium filum aque* (*a*). The right of fishery in the adjoining proprietor extends, of course, only along the length of his own boundary next to the river, and not in general beyond (*b*).

SECTION 5.—SEA WALLS AND RIVER EMBANKMENTS.

Sea Walls and River Embankments.—It is part of the duty of the Crown of England to protect the realm

(*u*) See the cases cited in the note (*s*), p. 61, *ante*.

(*v*) Plow. 154 ; Butler's note to Co. Litt. 122a (note 7).

(*y*) Co. Litt. 122a (note 7).

(*z*) Dav. Rep. 155 ; *Tilbury v. Silva* (1890), 45 Ch. D. 98.

(*a*) *Carter v. Murcot* (1768), 4 Burr. 2162 ; *Blount v. Layard*, [1891] 2 Ch. 681 n., at p. 689 n.

(*b*) See *Ogston v. Stewart*, [1896] A. C. 120.

from the incursions of the sea by appropriate defences (*c*). There is no obligation at common law upon a landowner whose lands abut upon the foreshore or upon a tidal creek, to raise defences against the water (*d*) ; and if he omits to do so with the result that his neighbour's land is flooded, he is not liable for the damage (*e*). Such an obligation may, however, arise under the doctrine of prescription (*f*).

The mode of fulfilling this duty of the Crown has for centuries been regulated by statute. A long series of enactments known as the Statutes of Sewers (*g*), which are in the main merely confirmatory of the common law (*h*), have imposed upon bodies known as the Commissioners of Sewers the duty of preserving defences against inroad from the sea, and from flood in navigable water-courses. By these Acts the powers and duties of the commissioners have been from time to time enlarged.

In the case of harbours, docks, ports and navigable rivers the duty of preserving defences and works against inroad by flood is almost invariably imposed upon some statutory

(*c*) *Att.-Gen. v. Tomline* (1880), 14 Ch. D. 58, at p. 61 (JAMES, L.J.) ; *Isle of Ely Case*, 10 Co. Rep. 141a.

(*d*) *Hudson v. Tabor* (1876), 1 Q. B. D. 225.

(*e*) *Hudson v. Tabor*, *supra*. See also *R. v. Commissioners of Sewers for Fobbing Levels* (1885), 14 Q. B. D. 561 ; *Keighley's Case*, 10 Rep. 139a ; *R. v. Commissioners of Sewers for Somerset*, 8 T. R. 312.

(*f*) As to prescription generally, see pp. 20 *et seq.*, *ante*.

(*g*) These statutes are principally the following : 23 Hen. 8, c. 5 ; 3 & 4 Edw. 6, c. 8 ; 13 Eliz. c. 9 ; 7 Anne, c. 10 ; 3 & 4 Will. 4, c. 22 ; 4 & 5 Vict. c. 45 ; 12 & 13 Vict. c. 50 ; 24 & 25 Vict. c. 133.

(*h*) " The various Statutes of Sewers, beginning with the statute 6 Hen. 6, c. 5, do but regulate the exercise of the prerogative in this respect, and prescribe the forms of commissions for the ordering and execution of the necessary works, which forms have from time to time been varied. In early times probably the king ordered the construction of such sea-walls as he judged necessary, very much according to his own discretion. In process of time, however, this discretion came to be limited by established rules, and at last by statute " (*per* Lord COLERIDGE, C.J., in *Hudson v. Tabor* (1877), 2 Q. B. D. 290, at p. 294).

body, and the rights and powers of the Commissioners of Sewers are generally vested in such bodies.

Principal Statutory Provisions concerning the Functions of the Commissioners of Sewers.—By the principal statute (*i*), certain commissioners were to be named by the Lord Chancellor, and Lord Treasurer of England, and the two Chief Justices, or any three of them ; and these commissioners were thereby empowered to survey all walls, streams, ditches, banks, gutters, sewers, gotes, calcies, bridges, trenches, mills, mill-dams, flood-gates, ponds, locks, hebbing-weirs, and other impediments, and to cause the same, in their discretion, to be made, corrected, repaired, amended, put down or reformed, as the case might require. They were also empowered to inquire, with the aid of a jury (*k*), through whose default the said hurts and damages had happened, and who had any lands or tenements which were endangered by reason thereof, and to tax and assess the wrongdoers towards such repairs and amendments as were wanted. They were further empowered to re-form, repair, and make the said walls, ditches, banks, and sewers in all places where it was thought necessary, and also to cleanse and purge the said trenches, sewers, and ditches, and to remove all such mill-dams, weirs, and other impediments and annoyances as should be found excessive or hurtful (*l*). For the purpose of carrying their commission more effectually into execution, full power and authority were, by the same statute, conferred upon and vested in the commissioners to make and ordain laws, ordinances and decrees, and to enforce the same, both upon private individuals and upon the king (*m*).

(*i*) 23 Hen. 8, c. 5.

(*k*) See *Wingate v. Waite* (1840), 6 M. & W. 739 ; *R. v. Warton*, 2 B. & S. 719.

(*l*) 23 Hen. 8, c. 5, ss. 1—3. See also *R. v. Inhabitants of Westham*, 10 Mod. 159 ; *R. v. Bristol Dock Co.*, 6 B. & C. 181 ; and 24 & 25 Vict. c. 133, ss. 17, 19.

(*m*) 23 Hen. 8, c. 5, ss. 4—6 ; *Netherton v. Ward*, 3 B. & Ald. 21 ; *Soady v. Wilson*, 3 Ad. & E. 248 ; 3 & 4 Will. 4, c. 22, ss. 53, 55.

Pursuant to the provisions of the Act, and by virtue of a commission under the Great Seal, the Courts of the Commissioners of Sewers were accordingly set up. It has been held that these courts are courts of record, and consequently may fine and imprison for contempt (*n*). But although they are courts of great antiquity and invested with an extensive and somewhat arbitrary jurisdiction they are nevertheless inferior courts, and as such are amenable to the superior jurisdiction of the King's Bench Division of the High Court of Justice.

By the Sewers Act, 1833 (*o*), it was provided that, until they were repealed by a subsequent Court of Sewers, all laws, decrees, and ordinances, which were duly registered, were to continue in force and effect, notwithstanding the determination of the commission under which they were made (*p*).

By the Land Drainage Act, 1861 (*q*), it was declared lawful for the Crown, upon the recommendation of the Inclosure Commissioners, to direct commissions of sewers into all parts of England—inland as well as maritime—and to assign the area within which the jurisdiction of each such commission should exercise its jurisdiction; and a commission once issued is to continue in force until superseded. This last-mentioned Act extends to all commissions of sewers granted even before the Act (*r*).

Jurisdiction of the Commissioners of Sewers.—The Sewers Act, 1833 (*s*), also provided that all walls, banks, culverts, and other defences whatsoever, whether natural or artificial, situate or being by the coasts of the sea, and all rivers, streams, sewers and watercourses, which then

(*n*) See *Newcastle (Duke) v. Clark* (1818), 8 Taunt. 602.

(*o*) 3 & 4 Will. 4, c. 22.

(*p*) *Ibid.*, s. 7. Commissions continued for ten years only under 13 Eliz. c. 9, s. 1, and 3 & 4 Will. 4, c. 22, s. 6.

(*q*) 24 & 25 Vict. c. 133.

(*r*) *Ibid.*, ss. 2, 4, 14.

(*s*) 3 & 4 Will. 4, c. 22.

were or thereafter should or might be navigable, or in which the tide did or thereafter should or might ebb and flow, or which then did or thereafter should or might directly or indirectly communicate with any such navigable or tidal river, stream or sewer—and all walls, banks, culverts, bridges, dams, flood-gates, and other works erected or to be erected, in, upon, over, or adjoining to any such rivers, streams, sewers or watercourses—should be from thenceforth to all intents, constructions, and purposes within and subject to the jurisdiction of the Commissioners of Sewers; but the commissioners were not to interfere with works theretofore erected for the purpose of ornament in or upon a watercourse, near or contiguous to a dwelling-house, without the consent in writing of the owner or proprietor thereof first had and obtained (*t*). By the Land Drainage Act, 1861 (*u*), further powers were given to the commissioners for the maintenance and improvement of all existing sewers, walls, and other defences against water, and for the construction of new works for the purpose of drainage and irrigation.

Under the Sewers Act, 1833 (*x*), the commissioners may purchase lands for the purpose of enlarging and improving any of their existing works. There having been theretofore some doubt as to how far the old statutes of sewers warranted the commissioners in constructing entirely new works, it was provided that the commissioners might construct new works, upon obtaining the consent thereto of a certain number of the owners and occupiers within the level (*y*). But by the Land Drainage Act, 1861, no purchase is to be made of land for new works, otherwise than by private agreement, unless with the sanction of Parliament first had and obtained in the manner pointed out by the Act (*z*).

(*t*) 3 & 4 Will. 4, c. 22, s. 10.

(*u*) 24 & 25 Vict. c. 133, s. 16.

(*x*) 3 & 4 Will. 4, c. 22, ss. 24—39.

(*y*) *Ibid.*, ss. 19—21.

(*z*) 24 & 25 Vict. c. 133, s. 21.

Provisions where Cost of Works exceeds £1,000.—

Under the Land Drainage Act, 1861 (*a*), the commissioners, previously to commencing any new works which will involve an expenditure of £1,000 or upwards, must cause plans of the proposed works, and an estimate of the expense thereof, to be made, and must publish their intention to execute such new works at least two months before commencing the same (*b*) ; and if within such period of two months the proprietors of one-half of the area of the land to be rated declare their dissent, the commissioners are to take no further steps, but if no such declaration is made, the commissioners may commence the work, and, out of the rates to be levied by them within the area, pay all the expenses incurred (*c*). Rates may be levied by the commissioners for defraying all the costs incurred by them, and all their expenses of such new works as aforesaid, but it is expressly provided, that any rate to be levied for the purpose of defraying the expense of improvements or new works involving an expenditure of more than £1,000, shall be deemed to be a special rate, and a tax on the owners of property, that is to say, the "*proprietors*," within the area (*d*). These persons, however, have been held not properly chargeable with expenses incurred by a drainage board in making preliminary surveys and plans for certain proposed works, the estimates for which exceeded £1,000, where the proprietors of one-half of the land dissented from the execution of the works, which were accordingly never carried out, but it was held that a *general* rate on the occupiers of land in the district, in order to pay for the expenses of the surveys and plans was proper (*e*).

(*a*) 24 & 25 Vict. c. 133.

(*b*) *Ibid.*, s. 29.

(*c*) *Ibid.*, s. 31.

(*d*) *Ibid.*, s. 38.

(*e*) *Griffiths v. Longdon and Eldersfield Drainage Board*, L. R. 6 Q. B. 738.

Disposition of Discarded Soil, etc.—Under the Sewers Act, 1833, the occupier of land adjoining any river or sewer within the Statutes of Sewers may, within a time specified, take away for his own use the soil, earth, and weeds that have been deposited upon the banks of the river or sewer ; and such soil, earth, and weeds must be removed at least ten feet from the land side of the banks (*f*). If any occupier neglects to remove, within the time specified in the Act, the gravel, soil, and weeds which have been deposited as aforesaid, the commissioners may themselves enter his land and remove them ; and this they are bound to do if the occupier gives them notice to do so (*g*).

(*f*) 3 & 4 Will. 4, c. 22, s. 22.

(*g*) *Ibid.*, s. 23.

CHAPTER III.

THE RIGHT OF SUPPORT FOR LAND AND BUILDINGS.

SECT.	PAGE
1.— <i>Natural Rights of Support</i>	70
2.— <i>Accessorial Rights of Support</i>	77
3.— <i>Acquisition of the Right of Support to Buildings, etc.</i> ...	79
4.— <i>Special Statutory Rights and Obligations with Regard to Support</i>	85

Prefatory Remarks on the Law of Support.—The law of support for land and buildings is a very important branch of the law relating to boundaries. It affords a striking example of the application of the maxim *Sic utere tuo ut alienum non laedas*; and instances the necessary curtailment of a man's enjoyment of property, to give effect to the equal rights of his neighbour (a).

The law of support subdivides itself naturally into two great categories of rights: (1) natural rights of support, and (2) accessorial rights relating to support. The first category embraces the right to support for land in its natural state, and all rights of support which are said to arise *ex jure nature*, and to be "of common right." The second category embraces, on the other hand, rights of support which do not exist of common right, but are founded upon a conventional basis, and arise under some actual implied or presumed grant of the right by some competent grantor. They are indeed modifications or variations of the natural rights. This category includes rights of support for buildings by adjacent and subjacent land and by adjoining buildings, and rights conflicting

(a) See the dicta of RIGBY, L.J., in *Jordeson v. Sutton, South-coates and Drypool Gas Co.*, [1899] 2 Ch. 217, at p. 243.

with the natural right of support, such as the right of depriving land of the support afforded by subjacent land.

Support may be, on the other hand, lateral or adjacent, or, on the other hand, vertical or subjacent. Lateral or adjacent support is the support afforded by the resisting force of two masses lying side by side. Vertical or subjacent support is the resisting force afforded by one mass lying beneath another mass.

The usual form of ownership of land is, as we have seen (*b*), the ownership of the surface, with everything above and below it. It is generally only in cases where this usual form of ownership obtains that questions of lateral support arise. But where the form of ownership common in mining districts subsists, that is to say, where the surface is owned apart from the strata beneath it, and strata and substrata are owned as separate subject-matters of ownership, questions of vertical support arise, and may be of the greatest importance.

SECTION 1.—NATURAL RIGHTS OF SUPPORT.

Support of Land by Land.—Every owner of land enjoys *ex jure naturæ* a right to the continuance of the support afforded by his neighbour's land to his own (*c*). He is entitled to the preservation of this support whether the support be lateral (*d*) or vertical (*e*); but only where

(*b*) See p. 3, *ante*.

(*c*) *Dalton v. Angus* (1881), 6 App. Cas. 740, at p. 791 (Lord SELBORNE); *Humphries v. Brogden* (1850), 12 Q. B. 739, at p. 744; *Rowbotham v. Wilson* (1857), 8 E. & B. 123; *Birmingham Corporation v. Allen* (1877), 6 Ch. D. 284; *New Moss Colliery Co., Limited v. Manchester (Corporation)*, [1908] A. C. 117.

(*d*) *Birmingham (Corporation) v. Allen*, *supra*, at p. 289; *Dalton v. Angus*, *supra*, at p. 808; *New Moss Colliery Co., Limited v. Manchester (Corporation)*, *supra*.

(*e*) *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, at p. 313; *Davis v. Treharne* (1881), 6 App. Cas. 460; *Love v. Bell* (1884), 9 App. Cas. 286.

the land remains in its natural condition unencumbered by the additional weight of buildings (*f*). Consequently if a man, by excavation or other works upon his own land, so interferes with the support afforded by that land to the adjoining land, as to affect appreciably the enjoyment of the latter, he will be liable for the damage thereby caused. Again, where the surface is owned by one person and the subsoil by another, the latter may not (apart from an accessorial right justifying the disturbance) use his property in such a manner as to deprive the surface of the support afforded by the subsoil in its natural position (*g*). Again, where a stratum is owned by one person, and a substratum is owned by another, the latter may not deprive the former's land of support.

"In the natural state of land," said Lord SELBORNE in *Dalton v. Angus* (*h*), "one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural, and is necessary as long as the *status quo* of the land is maintained; and, therefore, if one parcel of land be conveyed, so as to be divided in point of title from another contiguous to it, or (as in the case of mines below it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself, *sine quo res ipsa haberi non debet*. All existing divisions of property in land must have been attended with this incident, when not excluded by contract; and it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor

(*f*) See p. 75, *post*.

(*g*) *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, *supra*; *Davis v. Treharne* (1881), 6 App. Cas. 460, at p. 466 (Lord BLACKBURN); *Harris v. Ryding* (1839), 5 M. & W. 60; *Backhouse v. Bonomi* (1861), 9 H. L. Cas. 503; *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127.

(*h*) (1881), 6 App. Cas. 740, at p. 791.

is responsible, upon the principle, *sic utere tuo ut alienum non lœdas*” (i).

Infringement of the Natural Right of Support.—This natural right of support from adjacent land for land in its natural state is not a right to the preservation of the supporting mass in its natural state, that is to say, the right is not infringed by the mere removal of the mass which naturally affords the support (k). A mineowner, for instance, although obliged to regard the surface owner’s right of support for the surface, may remove all the coal and substitute artificial means of support (l).

When Cause of Action arises.—It is not upon the actual removal of the supporting substance that the cause of action arises, but upon the happening of the effect of the result of the removal (m). It often occurs in mining cases that the supported land is not affected until some time after the actual removal of the support. This fact does not absolve the mining owner from liability, for he becomes, nevertheless, liable upon the happening of the effect on the supported land. It is to be observed, however, that the application to cases of support of the well-known principle that the law presumes damage upon proof of the bare infringement of a legal right (n), has occasioned some confusion (o), but the result of the authorities seems

(i) *Dalton v. Angus*, *infra*, at p. 791 ; *Mundy v. Rutland (Duke)* (1883), 23 Ch. D. 91, at p. 96. See *Butterley Co., Limited v. New Hucknall Colliery Co., Limited*, [1909] 1 Ch. 37, affirmed, [1910] A. C. 381 [H. L.].

(k) *Bonomi v. Backhouse* (1858), E. B. & E. 622, at p. 655 ; *Rowbotham v. Wilson* (1857), 8 E. & B. 123, at p. 157 [Ex. Ch.] ; *Dalton v. Angus* (1881), 6 App. Cas. 740, at p. 808 ; *West Leigh Colliery Co., Limited v. Tunnicliffe and Hampson, Limited*, [1908] A. C. 27, at p. 30.

(l) *Rowbotham v. Wilson*, *supra*, at p. 157.

(m) *Att.-Gen. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301, at p. 311.

(n) See *Ashby v. White* (1704), 2 Ld. Raym. 938 (Lord Holt) ; *Embrey v. Owen* (1851), 6 Ex. 353, at p. 368 (PARKE, B.).

(o) Thus, in *Nicklin v. Williams* (1854), 10 Ex. 259, at p. 267, PARKE, B., said : “ We think this action is for an injury to a

to be this—viz., that the legal right of support is a right not to have the land appreciably affected by a deprivation of support, and that this right is, therefore, only infringed by the land being appreciably affected (*p*). At the same time, however, to support the cause of action against the defendant, it must be shown that the damage was caused directly or indirectly, mediately or immediately, by his excavations or other works.

Successive Subsidences.—Although due to the same act of deprivation of support, a separate cause of action, it would appear, arises upon the happening of each successive and distinct subsidence (*r*). Although damages

right; and consequently there was a complete cause of action when the wrong was done, and not a new cause of action when damage was sustained by reason of the original wrong. When so much of the land, coal or substratum was taken away as to deprive the plaintiffs' land and house, etc. of the support to which the plaintiffs were entitled, a cause of action accrued, though no actual damage accrued by the sinking of the land or falling of the house: although it would not be easy to prove that an essential part of the support was withdrawn unless some actual effect upon the land or structure was produced." Lord WESTBURY, in *Backhouse v. Bonomi*, *infra*, at p. 512, although he considered the decision in *Nicklin v. Williams* to be beyond all question, remarked that some of the dicta in the last mentioned case were "certainly not necessary for the decision." See also *Darley Main Colliery Co. v. Mitchell*, *infra*, where the decision in *Nicklin v. Williams* was further discussed.

(*p*) *Backhouse v. Bonomi* (1861), 9 H. L. Cas. 503. at p. 512, where Lord CRANWORTH said: "I think the error in the view which has sometimes been taken upon this subject is this, it has been supposed that the right of the party whose land is interfered with is a right to what is called the pillars or the support. In truth, his right is a right to the ordinary enjoyment of his land, and till that ordinary enjoyment is interfered with, he has nothing of which to complain." *Att.-Gen. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301, at p. 311, where COLLINS, J., stated that "as soon as the condition of the plaintiff's land has been in fact changed to a substantial extent by the withdrawal of support, the plaintiff has sustained an *injuria* for which he may maintain an action without proof of pecuniary loss." See also *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127.

(*r*) *West Leigh Colliery Co., Limited v. Tunnicliffe and Hampson, Limited*, [1908] A. C. 27, where Lord ASHBOURNE, at p. 32, said

may have been recovered for the loss sustained by a former subsidence, upon the happening of a fresh subsidence, damages may be again recovered in respect of the loss sustained by the second subsidence (*s*). Where a subsidence has occurred, and may possibly occur again, damages are not recoverable in respect of the risk or fear of a future subsidence (*t*). Depreciation in the market value of the supported land, due to the mere apprehension of a further wrong, is not a matter which the law recognises (*u*).

Statute of Limitations.—The question as to the exact time when the cause of action arises in cases of support is often of importance where the defence of the Statute of Limitations is set up. It has been held that the statute only commences to run when the effect of the deprivation of support is first experienced; and that it does not necessarily run from the actual deprivation of the support (*x*).

Water-borne Support to Land.—Sometimes land in fact derives support from the presence of water in, or between, substrata; so that a neighbour, by excavating or doing other works upon his own land, *e.g.*, by sinking a well and thereby draining away the water, deprives the adjoining land of the support afforded by the presence of

“An owner can bring a fresh action for the damage caused by each fresh subsidence”; *Darley Main Colliery Co. v. Mitchell*, *infra*.

(*s*) *West Leigh Colliery Co., Limited v. Tunncliffe and Hampson, Limited*, *supra*; *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127, where compensation had been made in respect of a former subsidence.

(*t*) *West Leigh Colliery Co., Limited v. Tunncliffe and Hampson, Limited*, *supra*; *Lamb v. Walker* (1878), 3 Q. B. D. 389, at p. 400 (*per* COCKBURN, C.J.).

(*u*) *West Leigh Colliery Co., Limited v. Tunncliffe and Hampson, Limited*, *supra*.

(*x*) *Backhouse v. Bonomi*, *supra*; *Darley Main Colliery Co. v. Mitchell*, *supra*.

the water. Such an act is not wrongful. A man whose land is thus supported has no natural right to the continuance of this water-borne support (*y*). The reason which we may assign for this rule is the strength of the recognised principle that every owner of land may drain his land irrespective of the results upon such water in his neighbour's land as does not flow in a definite channel but merely percolates through the soil (*z*). Where, however, the support is afforded by a substance in a semi-liquid state, *e.g.*, by a bed of "running silt" (*a*), or by asphaltum (*b*), the right of support will attach. It may be observed that in the case of water, no property in the supporting substance exists (*c*); whereas in the case of semi-fluid matter, such as running silt and asphaltum, the supporting substances are themselves presumably the subject-matter of ownership (*d*).

Support of Buildings.—Inasmuch as the natural right of support of land by land is founded on the natural state of things, where additional weight is artificially imposed upon land, the owner has no natural right to the preservation of the support derived from adjacent or subjacent land (*e*). There is, therefore, no natural right of support for buildings which impose an additional weight upon the

(*y*) *Popplewell v. Hodgkinson* (1869), L. R. 4 Ex. 248; *Elliot v. North Eastern Rail. Co.* (1863), 10 H. L. Cas. 333, at p. 359. See also *English v. Metropolitan Water Board*, [1907] 1 K. B. 588.

(*z*) See the dicta of RIGBY, L.J., in *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, discussing *Popplewell v. Hodgkinson*, *supra*. As to a landowner's right of draining or collecting percolating water, see *Chasemore v. Richards* (1859), 7 H. L. Cas. 349.

(*a*) *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, *supra*.

(*b*) *Trinidad Asphalt Co. v. Ambard*, [1899] A. C. 594.

(*c*) *Race v. Ward* (1855), 4 E. & B. 702.

(*d*) "There is no authority," said RIGBY, L.J., in *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, *supra*, at p. 242, "for saying that there cannot be property in a bed of running silt." See also *Trinidad Asphalt Co. v. Ambard*, [1899] A. C. 594, at p. 602.

(*e*) *Dalton v. Angus* (1881), 6 App. Cas. 740, at p. 792.

supported land (*f*). On the other hand, however, the mere existence of buildings upon the land will not of itself debar the owner from recovering in respect of damage caused by a deprivation of support (*g*). But the owner must show that the subsidence would have occurred had the buildings not existed. If he can show this he may recover not only for the disturbance of the land but also for the damage caused to the buildings (*h*).

Support for Buildings from Buildings.—There is no natural right of support for buildings from buildings upon the adjoining land (*i*) ; so if a man pulls down his house and thus deprives his neighbour's house of the support formerly afforded by the house which has been pulled down, no cause of action arises in favour of his neighbour. But in such a case the owner pulling down his house must act without negligence, and he must interfere as little as possible with the adjoining house (*k*).

(*f*) *Wilde v. Minsterley* (1639), 2 Roll. Abr. Trespass (I.), pl. 1 ; *Wyatt v. Harrison* (1832), 3 B. & Ad. 871 ; *Palmer v. Fletcher* (1663), 1 Sid. 167 ; *Partridge v. Scott* (1838), 3 M. & W. 220 ; *Gayford v. Nicholls* (1854), 9 Ex. 702.

(*g*) *Brown v. Robbins* (1859), 4 H. & N. 186 ; *Hunt v. Peake* (1860), John. 705 ; *Bell v. Love* (1883), 10 Q. B. D. 547 ; *Hamer v. Knowles* (1861), 6 H. & N. 454. See also *Jardeson v. Sutton, Southcoates and Drypool Gas Co.*, [1898] 2 Ch. 514, at p. 625 (NORTH, J.) ; *Manchester Corporation v. New Moss Colliery Co., Limited*, [1906] 1 Ch. 278, at p. 290 (FARWELL, J.) ; *Great Western Rail. Co. v. Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157.

(*h*) *Hunt v. Peake*, *supra* ; *Bell v. Love*, *supra* ; *Brown v. Robbins*, *supra* ; *Hamer v. Knowles*, *supra* ; *Att.-Gen. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301, at p. 312.

(*i*) *Peyton v. London (Corporation)* (1829), 9 B. & C. 725. See also *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603, at p. 612 (COLLINS, L.J.).

(*k*) "I think it is clear," said COLLINS, L.J., in *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*, *supra*, at p. 612, "that though the pulling-down owner must be careful to interfere as little as possible with the adjoining house, he is certainly not called upon to take active steps for its protection, as, for instance, by shoring it up. There is a broad distinction between exercising a right with reasonable care so as not to do avoidable damage, and taking active measures to insure the

On the other hand, however, if the latter house is in such a condition that an extraordinary amount of care would have been required in pulling down the first house, and the owner pulling down the first house has no notice of the condition of the adjoining house, he is not liable for not exercising that extraordinary amount of care (*l*).

SECTION 2.—ACCESSORIAL RIGHTS OF SUPPORT.

As already intimated rights in relation to support which are at variance with the foregoing natural rights of support may be acquired as easements. The acquired rights include—

- the right of support for buildings from adjacent land (*m*) ;
- a similar right to support for the additional weight of buildings where the surface and subjacent soil is in separate ownerships (*n*) ;
- a right to the support of building from adjoining buildings (*o*) ;
- and a right to let down the surface (*p*).

These rights are in the nature of easements, and they may in general be acquired in any one of the modes in which easements may be acquired (*q*), but as the general principles of the acquisition of easements, when applied to rights of support, present some difficulties, we shall devote a few pages in a subsequent portion of this Chapter to a more particular consideration of the acquisition of some of the most important of these rights of support (*r*).

continuance of something that is not a right in the adjoining owner."

(*l*) *Chadwick v. Trower* (1839), 6 Bing. N. C. 1 (Ex. Ch.), at p. 10 (PARKE, B.).

(*m*) See p. 78, *post*.

(*o*) See p. 78, *post*.

(*n*) See p. 78, *post*.

(*p*) See p. 78, *post*.

(*q*) As to the modes in which easements generally may be acquired, see pp. 13 *et seq.*, *ante*.

(*r*) See pp. 79 *et seq.*, and pp. 85 *et seq.*, *post*.

Easement of Support for Buildings.—That the right of support for buildings, and for land weighted by buildings, may be acquired as an easement is now well established (*s*) ; and the right to insist upon the preservation of support for buildings, and for land weighted by buildings, may be either a right to lateral support from adjacent soil (*t*), or a right to vertical support from subjacent soil, where the surface and the subjacent soil are in separate ownerships (*u*).

Support of Buildings by Buildings.—The right to the continuance of the support afforded by one building to another has been recognised as an easement (*x*). If the owner of the servient building which affords support to the dominant building, pull down the former, so that the latter falls or is damaged by reason of the deprivation of the support, he is liable to the owner of the dominant building for the damage thereby caused (*y*).

Right to Let down the Surface.—Although as we have seen (*z*), the owner of the subsoil must not deprive the surface of the support afforded to it by the subsoil, the law recognises a right in the nature of an easement which entitles the owner of the subsoil to deprive the surface of support (*a*).

(*s*) *Dalton v. Angus* (1881), 6 App. Cas. 740 ; *Rowbotham v. Wilson* (1860), 8 E. & B. 140.

(*t*) *Dalton v. Angus*, *supra* ; *Rigby v. Bennett* (1882), 21 Ch. D. 559.

(*u*) *Dalton v. Angus*, *supra*.

(*x*) *Lemaitre v. Davis* (1881), 19 Ch. D. 281 ; *Richards v. Rose* (1853), 9 Ex. 218 ; *Waddington v. Naylor* (1889), 60 L. T. 480. See *Jones v. Pritchard*, [1908] 1 Ch. 630, at pp. 636, 637 (PARKER, J.). See further, as to the acquisition of this right, pp. 79 *et seq.*, *post*. Cf. *Tone v. Preston* (1883), 24 Ch. D. 739.

(*y*) *Lemaitre v. Davis*, *supra*.

(*z*) See p. 70, *ante*.

(*a*) *Sitrell v. Londesborough (Earl)*, [1905] 1 Ch. 460, at pp. 464, 465 ; *Rowbotham v. Wilson* (1860), 8 H. L. Cas. 348, at p. 362. As to the acquisition of the right to let down the surface, see pp. 83 *et seq.*, *post*.

SECTION 3.—ACQUISITION OF THE RIGHT OF
SUPPORT TO BUILDINGS, ETC.

Implied Grant of the Right of Support to Buildings, etc.—If a man grants a part only of his land with a house thereon to another, the land which he retains is, as a general rule, thereby impliedly charged with an easement of support in favour of the grantee; so that the grantor cannot, by excavating upon the land retained, lawfully deprive the house of support; and if he do so he is liable for the damage occasioned to the house (*b*).

Similarly if part of a piece of land be sold for building purposes an easement of support will arise in favour of the owner of the buildings intended to be built thereon (*c*).

Again, an easement of support may arise in favour of a building upon the part of the land retained where the owner disposes of the other part to a grantee (*d*).

(*b*) *Dalton v. Angus* (1881), 6 App. Cas. 740, at pp. 792, 809, 826. "It is now established," said Lord BLACKBURN in that case (at p. 826), "that one who conveys a house does, by implication and without express words, grant to the vendee all that is necessary and essential for the enjoyment of the house, and that neither he, nor any who claim under him, can derogate from his grant by using his land so as to injure what is necessary and essential to the house." *Rigby v. Bennett* (1882), 21 Ch. D. 559 [C.A.]; *Richards v. Rose* (1853), 9 Ex. 218. See also the dictum of BOWEN, L.J., in *Myers v. Catterson* (1889), 43 Ch. D. 470, at p. 482. Cf. *Aspden v. Seddon* (1875), L. R. 10 Ch. App. 394; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557 [C.A.]. As to the acquisition of easements generally under the doctrine of implied grant, see p. 15, *ante*.

(*c*) *Rigby v. Bennett* (1882), 21 Ch. D. 559; *Siddons v. Short* (1877), 2 C. P. D. 572. "If the conveyance," said PAGE-WOOD, V.-C., in *North Eastern Rail. Co. v. Elliott* (1860), 1 John. & H. 145, at p. 153, "is made for the express purpose of having buildings erected upon the land so granted, a contract is implied on the part of the grantor to do nothing to prevent the land from being used for the purpose for which, to the knowledge of the grantor, the conveyance is made." See also *Jary v. Barnsley (Corporation)*, [1907] 2 Ch. 600, at p. 613.

(*d*) *Sherbrook v. Tufnell* (1882), 46 L. T. (N.S.) 886. See also *Richards v. Rose* (1853), 9 Ex. 218.

But the question whether an easement of support arises or not in any of the preceding cases is a question of the intention of the parties, which must be ascertained from the construction of the deed in the light of the circumstances subsisting at the time of the severance (*e*). As a general rule, an easement will arise by implication of law more readily in the case where the common owner disposes of the *quasi*-dominant tenement and retains the *quasi*-servient tenement (*i.e.*, disposes of the house and retains the land), than in the case where he disposes of the *quasi*-servient tenement and retains the *quasi*-dominant tenement (*i.e.*, disposes of the land and retains the house) (*f*). As a general rule also, *quasi*-easements absolutely necessary for the enjoyment of the property mature into easements upon severance, whether the servient tenement be retained and the dominant tenement be disposed of, or the dominant tenement be retained and the servient tenement be disposed of (*g*). Subject to the tendencies illustrated in the two preceding rules, the question whether an easement of support arises upon the severance of two properties must be solved by reference to the particular facts of the case from which must be gathered the presumed intention of the parties to the severance (*h*).

(*e*) *Murchie v. Black* (1865), 19 C. B. (N.S.) 190. See the judgment of JESSEL, M.R., in *Aspden v. Seddon* (1875), L. R. 10 Ch. App. 396 n., at p. 399 n.

(*f*) See p. 16, *ante*.

(*g*) See p. 16, *ante*; *Wheeldon v. Burrows* (1879), 12 Ch. D. 31, at p. 49. It is conceived that the rule that accommodations of necessity mature into valid easements on severance of tenements is often laid down in too dogmatic a manner. That there are degrees of necessity is abundantly clear. See the judgment of STIRLING, L.J., in *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, at p. 572. The true significance of the rule appears to be this, that if the non-continuance of the accommodation as a valid easement were to render the grant an absurdity then the intended continuance of the accommodation must be presumed.

(*h*) See *Aspden v. Seddon* (1875), L. R. 10 Ch. App. 394. See also Combe's Law of Light, pp. 101 *et seq.*, where these principles with regard to easements generally are more fully elaborated.

Prescriptive Claims to the Right of Support to Buildings, etc.—It is now established beyond all doubt that where a building has for twenty years enjoyed support from land belonging to another person, the right to the continuance of that support may be established in favour of the owner of the house (*i*). The fact that interruption of the enjoyment of the support can only be effected with great trouble or expense, does not prevent the prescriptive acquisition of the right (*k*).

Nor does the objection that the enjoyment has been had without the knowledge of the owner of the land avail anything under ordinary circumstances, because the building of the house itself is open and ought to put the latter on guard (*l*). On the other hand, if, in fact, the enjoyment of the support has been secret, that is to say, of a nature that an ordinary owner of land, diligent in the protection of his interests, would not have had a reasonable opportunity of becoming aware of that enjoyment, no easement of support will be acquired (*m*).

Similarly, when a house has derived support from an adjoining house owned by another person, the owner of the first house acquires, as an easement, a right to the continuance of the support for his house (*n*).

The easements of support for buildings from adjoining land (*o*) and for buildings from adjoining buildings (*p*)

(*i*) *Dalton v. Angus* (1881), 6 App. Cas. 740 (which is the leading authority upon the subject); *Lemaitre v. Davis* (1881), 19 Ch. D. 281.

(*k*) *Dalton v. Angus*, *supra*.

(*l*) *Dalton v. Angus*, *supra*, at pp. 801, 802 (Lord SELBORNE), at p. 828 (Lord BLACKBURN).

(*m*) *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557.

(*n*) *Lemaitre v. Davis* (1881), 19 Ch. D. 281.

(*o*) *Dalton v. Angus*, *supra*, at p. 798 (*per* Lord SELBORNE). Lord BLACKBURN, in that case (at p. 815), expressly reserved the point for decision at some future time. His lordship's judgment, however, would appear to lean towards the opinion that the right of support is an easement which may be claimed under s. 2 of the Act.

(*p*) *Lemaitre v. Davis* (1881), 19 Ch. D. 281.

are, it would appear, easements claimable under the provisions of the Prescription Act, 1832 (*q*).

Statutory Acquisition of the Right to Support of Buildings, etc.—Where corporations and persons are empowered by the legislature to make works upon the lands of others, a right to support for these works is generally created either expressly or inferentially by the provisions of the statute. Common instances of this statutory creation of a right to support occur in the case of the statutory powers to make railways (*r*), canals (*s*), docks, waterworks (*t*), sewers (*u*), gasworks and roads (*x*).

Sometimes questions arise, where there are no express provisions with regard to the right of support for the works, whether the statutory creation of the right of support is, or is not, to be inferred. In such cases the general principles of construction appear to be these—first, that where an express statutory right is given to make and maintain a thing necessarily requiring support, the statute, in the absence of a context implying the contrary, must be taken to mean that the right to necessary support of the thing constructed shall accompany the right to make and maintain it (*y*); secondly, that this construction is greatly strengthened by provisions in the statute for the compensation of landowners for the infringement of and interference with their rights arising from the carrying out of the statutory powers (*z*); and,

(*q*) 2 & 3 Will. 4, c. 71.

(*r*) See p. 86, *post*.

(*s*) See *London and North Western Rail. Co. v. Evans*, *infra*. See also p. 88, *post*.

(*t*) See p. 88, *post*.

(*u*) See p. 89, *post*.

(*x*) See *Benfieldside Local Board v. Consett Iron Co.* (1877), 3 Ex. D. 54.

(*y*) *London and North Western Rail. Co. v. Evans*, [1893] 1 Ch. 16, at p. 28 (*per* BOWEN, L.J.), and at p. 31 (*per* A. L. SMITH, L.J.).

(*z*) *London and North Western Rail. Co. v. Evans*, [1893] 1 Ch. 16, at p. 31; *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1898] 2 Ch. 614, at p. 621. See also *In re Dudley Corporation*

thirdly, that in every case the general object and scope of the particular statute must be considered.

Acquisition of the Accessorial Right of Infringing the Natural Right of Support.—The right to infringe the natural right of support may be acquired. This acquired right is in the nature of an easement. It may arise by virtue of an Act of Parliament (*a*). It is a right capable of being granted (*b*), and may arise, therefore, by implied grant.

Implied rights of letting down supported land sometimes arise in the case of leases and other dispositions of subterranean property, such as seams of coal and mineral-bearing strata. Where dispositions of subterranean property however occur, severing the ownership of the surface from the subjacent property, there is a strong *prima facie* rule that the instruments of disposition ought to be construed in favour of the preservation of the natural right of support for the surface (*c*). The onus of showing that it was the intention of the parties to the deed that the owner of the subjacent property should have the right of

(1881), 8 Q. B. D. 86; *Metropolitan Board of Works v. Metropolitan Rail. Co.* (1869), L. R. 4 C. P. 192. See Cripps on Compensation (1905), pp. 120, 121. See, generally, *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305.

(a) See *Bell v. Dudley (Earl)*, [1895] 1 Ch. 182.

(b) *Rowbotham v. Wilson*, *infra*; *Sitwell v. Londesborough (Earl)*, [1905] 1 Ch. 460, where it was held that a tenant for life might under the Settled Land Acts grant a lease empowering the lessees to let down the surface of the settled land.

(c) *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, at p. 309 (Lord LOREBURN, C.); *Butterley Co., Limited v. New Hucknall Colliery Co., Limited*, [1909] 1 Ch. 37, at p. 48 (FLETCHER MOULTON, L.J.), and at p. 54 (FARWELL, L.J.); *Rowbotham v. Wilson* (1860), 8 H. L. Cas. 360 (Lord WENSLEYDALE); *Hest v. Gill* (1872), L. R. 7 Ch. App. 699; *Smith v. Darby* (1872), L. R. 7 Q. B. 716, at p. 723 (BLACKBURN, J.); *Davis v. Treharne* (1881), 6 App. Cas. 460. See *Harris v. Ryding* (1839), 5 M. & W. 60; *Eadon v. Jeffcock* (1872), L. R. 7 Ex. 379; *Smith v. Darby* (1872), L. R. 7 Q. B. 716; and *cf. Aspden v. Seddon* (1875), L. R. 10 Ch. App. 394.

infringing the surface owner's natural right of support, lies upon the owner of the subjacent property (*d*), and this onus is not discharged by the insertion of powers of working getting and carrying away all the minerals expressed in general terms, or by reason of wide provisions for compensation (*e*).

Provisions for compensation by the subjacent owner or lessee for working the subjacent property are frequently inserted in instruments of this nature; but these provisions generally refer to compensation to the surface owner and his tenants for acts done on the surface by the subjacent owner or lessee, such as the sinking of pits, the erection of the necessary buildings and so forth. If the compensation clause be capable of being satisfied by reference to acts done on the surface, then, though it may be wide enough to cover also damage done to the surface by taking away the support, still it must be confined to damage done on the surface, and the inference that support may be taken away on payment of compensation will not be drawn (*f*).

The rule of construction applies with regard to the construction of a deed purporting to grant a right to the owner of substrata of infringing the natural right of support enjoyed by the owner of a subterranean stratum

(*d*) *Hext v. Gill* (1872), L. R. 7 Ch. App. 699, at p. 714 (MELLISH, L.J.).

(*e*) *Butterley Co., Limited v. New Hucknall Colliery Co., Limited*, [1909] 1 Ch. 37, at p. 54 (*per* FARWELL, L.J.). But the fact that compensation for damage caused by depriving the surface of support is provided for in the deed of severance, has an important bearing on the question whether a right has been granted to let down the surface. "If you find that the exact sort of damage was contemplated by the parties, and that compensation was agreed to be given for it, you must imply the right to do the thing, the power of doing which must have been contemplated in order to cause damage to be contemplated" (*per* JESSEL, M.R., in *Aspden v. Seddon* (1875), L. R. 10 Ch. App. 394, at p. 399 n.). See also *Bell v. Dudley (Earl)*, [1895] 1 Ch. 182.

(*f*) *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, at p. 309 (*per* Lord LOREBURN); *Smith v. Darby* (1872), L. R. 7 Q. B. 716 (LUSH, J.).

lying below the surface but above the substrata (*g*). But it has been suggested, with apparent force, that the strength of the rule is not so great in the latter case as in the case of support for the surface (*h*).

SECTION 4.—SPECIAL STATUTORY RIGHTS AND OBLIGATIONS WITH REGARD TO SUPPORT.

Prefatory Remarks.—The rights and obligations with regard to the support of the works of public undertakings do not admit of treatment under the general principles of the law of support already mentioned. They stand upon a peculiar footing, partially because, in the majority of cases, the form of ownership or user of the land is peculiar and unknown to the common law (*i*), and partially because, in many important cases, the legislature has virtually abolished the applicability of the ordinary rights and liabilities of landowners and has set up a new code of rights (*k*). The rights and obligations of the undertakers, or of corporations acquiring land or the use of land for the purposes of a public undertaking, such as a railway, a canal, waterworks, public sewers, etc., may be regulated (1) according to the rights and obligations of ordinary

(*g*) See *Butterley Co., Limited v. New Hucknall Colliery Co., Limited*, *supra*.

(*h*) "So dependent is the use of the surface upon the enjoyment of support," said FLETCHER MOULTON, L.J., in *Butterley Co., Limited v. New Hucknall Colliery Co., Limited*, *supra*, at p. 50, "that judges have sometimes spoken of its withdrawal as well nigh amounting to a destruction of the property in the surface. The same cannot be said of support to a seam of coal. Anyone acquainted with coal mines must know that it is an ordinary mining incident to work coal which has been or is being allowed to sink by reason of lower workings."

(*i*) As in the case of sewers vested in the sanitary authority. In many cases the surface only of the land is acquired for the undertaking, and often the interest in the land is in the nature of a mere easement.

(*k*) See e.g., *London and North Western Rail. Co. v. Howley Park Coal and Canal Co.*, [1911] 2 Ch. 97, at p. 119 (FLETCHER MOULTON, L.J.).

landowners (l), or (2) according to those rights, as varied by statute, or (3) according to a new code of rights of support, as in the case where the nature of the general and particular legislation with regard to the undertaking is such that the common law rights or obligations relating to support are rendered wholly inoperative (m).

It is not within the scope of this Book to enter into a full exposition of the very numerous statutory provisions governing the acquisition of land for statutory purposes. In the first place the varieties of statutory undertakings are very numerous, and in the second place the rights and obligations of the promoters and undertakers are often the subject-matter of private Acts containing special and particular provisions relating to the particular undertaking. But it is not out of place in a book of this kind to give a brief summary of the general and usual provisions which apply in the case of the most important and common classes of undertakings.

Railway Companies acquiring Land under the Railways Clauses Consolidation Act, 1845.—Where a

(l) See e.g., *Jury v. Barnsley Corporation*, [1907] 2 Ch. 600.

(m) Thus, with regard to the provisions of the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), in respect of support for railways—provisions under which the great majority of railways are constructed—it has been said that “it was obviously the intention of the legislature, in making these provisions, to create a new code as to the relation between mine owners and railway companies, where lands were compulsorily taken for the purpose of making a railway”; and that “the object of the statute was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more” (*per* Lord CRANWORTH in *Great Western Rail. Co. v. Bennett* (1867), L. R. 2 H. L. 27, at p. 40. See also *In re Arbitration between Lord Gerard and London and North Western Rail. Co.*, [1895] 1 Q. B. 459). The same remarks apply in general to the similar provisions under which other public undertakings, such as waterworks and canals, acquire the use of land. See *Cripps on Compensation* (1905), pp. 122, 123; *Dudley Canal Co. v. Grazebrook* (1830), 1 B. & Ad. 59, at p. 69. See, generally, *Great Western Rail. Co. v. Bennett* (1867), L. R. 2 H. L. 27.

railway company acquires land under the Railways Clauses Consolidation Act, 1845 (*n*), the surface of the land only passes, and the minerals and substrata remain in the landowner, for "mines" of minerals are deemed to be excepted out of the conveyance of such lands unless they are expressly mentioned (*o*).

If the company do not state their willingness to treat within thirty days the landowner may work the mines, "so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate" (*p*). If he improperly works the mines and thereby occasions damage to the railway or works, he is liable for the expense of making it good (*q*). But although the minerals are thus retained by the landowner, his right of working them is qualified by the statute. He may not work them within a prescribed distance of the railway or any of the works connected therewith, unless he has given notice to the company of his intention so to do. This prescribed distance in the absence of special provisions in any special Act, is forty yards (*r*). If he gives notice, the company if it wishes, may give him a counter notice to the effect that it is willing to give him compensation for not carrying out his intention (*s*).

Where the company purchases the right of making and maintaining a tunnel through land, the landowner's rights and obligations with regard to working or abstaining from working the minerals are the same as those already mentioned. He may work the mines after fulfilling the

(*n*) 8 & 9 Vict. c. 20.

(*o*) 8 & 9 Vict. c. 20, s. 77. Under this section, however, the company is entitled to such parts of the land purchased as shall be necessary to be dug or carried away or used in the construction of the works.

(*p*) 8 & 9 Vict. c. 20, s. 79.

(*q*) 8 & 9 Vict. c. 20, s. 79.

(*r*) 8 & 9 Vict. c. 20, s. 78.

(*s*) *Ibid*

statutory conditions as to notice and so forth, and may even withdraw the support to the tunnel, without being liable, if the withdrawal of support is the result of his working the minerals in the prescribed manner (*t*).

Waterworks Companies acquiring Land under the Waterworks Clauses Act, 1847.—Very similar provisions apply to the purchases of land by waterworks companies under the Waterworks Clauses Act, 1847 (*u*). Under that Act the undertakers are not entitled to the minerals unless expressly purchased (*x*). Protection for the support for the reservoirs, pipes, conduits, and other works is similarly afforded by provisions whereby the mineral owner or occupier must notify the undertakers of his intention to work the minerals within a prescribed distance; and the undertakers may prevent a disturbance of the support by compensating him for not so doing (*y*). If the undertakers do not treat with the mineral owner or occupier, the latter may work the mines and drain the same, in the same manner as if the Act and the special Act had not been passed, provided no wilful damage be done to the undertakers' works, and that the mines are not worked in an unusual manner (*z*). If the mines are worked in an unusual manner and damage is occasioned to the undertakers' works, the mineral owner or occupier is liable for the expense of making good the same (*a*).

Support for Canals.—With regard to canals, the respective rights and obligations of the undertakers, and of the adjoining landowners, with regard to the support for the works of the former, generally depend upon the

(*t*) *London and North Western Rail. Co. v. Ackroyd* (1862), 31 L. J. Ch. 588.

(*u*) 10 & 11 Vict. c. 17.

(*x*) 10 & 11 Vict. c. 17, s. 18.

(*y*) 10 & 11 Vict. c. 17, ss. 22, 23. If no distance is prescribed by the special Act, the distance is forty yards.

(*z*) 10 & 11 Vict. c. 17, s. 23.

(*a*) 10 & 11 Vict. c. 17, s. 23.

particular provisions of private and special Acts ; and for this reason it is not within the scope of this Book to enter upon a discussion of these rights and obligations. It suffices to say, that the rights of support depend upon the construction of the particular Act (*b*).

Support for Sewers.—The law with regard to the support for sewers of sanitary authorities rests partially upon the principles governing the rights of support for land enjoyed by private persons, and partially upon statute. It was not until 1883 that the peculiar statutory code affecting rights of support was introduced in respect of sewers. In that year by the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (*c*), the sections (already dealt with) of the Waterworks Clauses Act, 1847 (*d*), with regard to the non-working and working of minerals, notices, and compensation, were (with certain minor modifications) in effect made applicable to the case of sewers vested in the sanitary authority ; but any rights of support for sewers and sanitary works previously acquired were expressly preserved (*e*).

By the Public Health Act, 1875 (*f*), all existing and future sewers were vested in the local sanitary authority, except private sewers, land drainage sewers, and sewers under the control of the Commissioners of Sewers (*g*). That authority was also empowered to construct new sewers, and acquire lands or easements for that purpose ;

(*b*) The reader is referred to the following cases of construction of particular Acts, which relate to the right of support for canals : *Dudley Canal Co. v. Grazebrook* (1830), 1 B. & Ad. 59 ; *Knowles v. Lancashire and Yorkshire Rail. Co.* (1887), 20 Q. B. D. 391 ; *Chamber Colliery Co. v. Rochdale Canal Co.*, [1894] 2 Q. B. 632 ; [1895] A. C. 564.

(*c*) 46 & 47 Vict. c. 37, s. 3.

(*d*) 10 & 11 Vict. c. 17. See p. 88, *ante*.

(*e*) 46 & 47 Vict. c. 37, s. 5.

(*f*) 38 & 39 Vict. c. 55.

(*g*) 38 & 39 Vict. c. 55, ss. 13—15. For an outline of the history of the jurisdiction of this body, see pp. 64, *et seq.*, *ante*.

and was charged with the maintenance, alteration, and improvement of all sewers belonging to it.

It being impossible to conceive that the legislature could have given the local authority a power, as against landowners, to make sewers, and have imposed an obligation in favour of landowners to repair them, without at the same time giving the right to support, it was held that a right, at any rate, to subjacent or vertical support was impliedly created by the Act (*h*). It was also held that under the provisions of the Act a right of immediate compensation arose in favour of the landowner in respect of the loss he suffered in being obliged to abstain from utilising his land, subsoil, and minerals, in order to preserve the support of the sewer (*i*).

It may be observed that the existence of compensation provisions appears to have had some weight with the Court in the last-mentioned decision, for in another case (*k*), where a sewer had been made by the Metropolitan Commissioners of Sewers under statutory provisions which did not include a provision for compensating landowners, it was held that there was no implied or other right of lateral support for the sewer (*l*).

By the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (*m*), however, the rights and obligations of local authorities on the one hand and landowners on the other, with regard to support for sewers

(*h*) *In re Corporation of Dudley* (1881), 8 Q. B. D. 86. In this case BRETT, L.J., held that lateral support for the sewer was not to be implied, but COTTON, L.J. (at p. 96), preferred apparently to leave this question open.

(*i*) *In re Corporation of Dudley* (1881), 8 Q. B. D. 86, at p. 94.

(*k*) *Metropolitan Board of Works v. Metropolitan Rail. Co.* (1869), L. R. 4 C. P. 192. This case was especially distinguished by each of the three lord justices in *In re Corporation of Dudley*, *supra*.

(*l*) In this case the absence of provisions for compensation appears to have influenced the court in deciding that no right of support existed. See *per* KELLY, C.B., at p. 194.

(*m*) 46 & 47 Vict. c. 37.

vested in the former, were put upon a different footing. By this Act it was provided, both as regards vertical and lateral support, that the provisions contained in ss. 18—27 of the Waterworks Clauses Act, 1847 (*n*), to which we have already referred (*o*), should, with certain minor modifications, be incorporated with the Act and with the special Act or Provisional Order under which this class of sewers are constructed. The Act of 1883 provides that the sanitary authority may by notice require that a specified measure of support be left for the sewers, as well within as beyond the distance of forty yards from the sewers; the landowners being compensated accordingly. A sanitary authority is not, however, by reason only of anything contained in the special Act or Provisional Order, to be deemed to have acquired, or to be entitled to or bound to acquire, or to make compensation for, any right of support for such sanitary work as against any person owning or working any mine (*p*). On the other hand, nothing in the special Act or Provisional Order is to be deemed to have subjected any person to any liability to the sanitary authority in respect of damage to a sanitary work caused in the working of any mines in a reasonable and proper manner (*q*). Where any right has been acquired before the passing of the Act (August 25th, 1883), and no compensation was at that date recoverable therefor, the Act does not apply to the sanitary work in respect of which such right of support was acquired, or operate to deprive the sanitary authority of such right, or entitle any person to any compensation in respect thereof, to which such person would not have been entitled but for the Act (*r*).

(*n*) 10 & 11 Vict. c. 17.

(*p*) 46 & 47 Vict. c. 37, s. 4.

(*o*) See p. 88, *ante*.

(*q*) *Ibid*.

(*r*) 46 & 47 Vict. c. 37, s. 5. See *Jary v. Barnsley Corporation*, [1907] 2 Ch. 600.

CHAPTER IV.

FENCES.

SECT	PAGE
1.— <i>On Fences Generally</i>	92
2.— <i>Maintenance and Repair of Fences</i>	95
3.— <i>Fencing Obligations</i>	97
SUB-SECT.	
1.— <i>Express Agreements</i>	97
2.— <i>Fencing against a Common</i>	98
3.— <i>Prescriptive Obligations</i>	100
4.— <i>Common Law Obligation to Fence Excavations</i> ...	109
5.— <i>Statutory Obligations on Railway Companies to Fence their Lines</i>	113
6.— <i>Statutory Obligations on Mineowners to Fence Shafts, etc.</i>	116

SECTION 1.—ON FENCES GENERALLY.

Concerning Fences Generally.—The primary functions of a fence are, on the one hand, to guard against intrusion, and on the other to prevent the owner of the land incurring liability by his animals straying upon his neighbour's land. Often, however, the object of a fence is to provide a visible boundary line between two properties. A fence may of course consist of anything which serves as a barrier ; but the most usual forms of fences are hedges, banks and ditches, walls, palings and rails. Generally a fence consists of a combination of two or more of these barriers. This is more particularly the case with regard to banks and ditches, for the construction of the one almost necessarily involves the construction of the other.

Ownership of the Fence.—When persons buy and sell or otherwise deal in land, the subsisting fences provide a ready means of identifying the subject-matter of the transaction. If we accept cases of purchases of small

building plots on so-called building estates, it is rare indeed that the plan to the contract, conveyance, lease or mortgage does not depict the existing fences. But from its very nature a fence rarely affords a method of ascertaining the exact boundary of property with precise accuracy. Consider now the usual, and indeed the only, methods of identifying the subject-matter of a transaction concerning land. First there is the plan; secondly, the abutments; thirdly, mensuration; fourthly, the description of the nature of the land, whether it be arable, pasture, woodland or waste; fifthly, the description by reference to present or former occupation; and sixthly, the reputed name of the field, farm or property. Which of these will decide the exact notional line which separates the adjoining property and which is admitted to be in, at, through, or on, the fence? Not one of them. Wherefore it is obvious that in very many cases the ownership of the strip of land—for, as we have seen, a fence may be in fact described as a strip—is left in doubt.

The actual limits of the subject-matter of a transaction concerning land depend in truth upon the intention of the parties. That intention is gathered primarily from the document which both have solemnly executed, and which they are presumed to have perused and considered, and to have intended that its express terms should be construed in accordance with their grammatical meaning. But the document must be construed by reference to the circumstances subsisting at the time of its execution; and it frequently occurs that the express terms of a document are not of themselves sufficient to indicate the intention of the parties in every particular. Thus the plan may not be accurate; the property may be misdescribed as regards abutments, mensuration, name, present or former occupation or situation. But this does not nullify the transaction. The effect of the transaction must be ascertained. This is done primarily by the aid of the well-known canons of construction, and by the aid of extrinsic evidence of the circumstances subsisting at

the time. Further, recourse is had, when the case requires it, to divers presumptions or inferences of fact which the courts draw, where certain circumstances are found to subsist or to have subsisted.

Presumption that the Owner of the Fence also Owns the Ditch.—There is a presumption that a ditch and fence belong to the owner of the land upon which the fence stands—that is to say, that where a ditch divides a particular piece of land from a fence or bank, it is presumed that the boundary of the land is the edge of the ditch furthest from the fence (*a*). The reason given for this presumption is this—that when a man makes a ditch and fence it is easier and more expedient for him to dig the ditch at the farthest limit of his land and to throw the soil dug out of the ditch on to his own land, than to dig the ditch at some distance from the limit of his land and to throw the soil towards his neighbour's land, the probability of trespass in the former case being less than in the latter case (*b*).

It is obvious that where there is a ditch on both sides of the fence or bank, that no presumption can arise (*c*), unless, possibly, where it is known under what circumstances one of the ditches was made. It is doubtful whether the presumption can be applied where it is not known whether the ditch is artificial or natural (*d*).

If there are two ditches, the one on each side of a bank or hedge : or if a bank be raised on both sides of a trench : or if there be an old bank without any apparent trench on either side ; the ownership of the bank, hedge or ditch

(*a*) See *Vowles v. Miller* (1810), 3 Taunt. 137, at p. 138 ; *Noye v. Reed* (1827), 1 Man. & Ryl. (K. B.) 63, at p. 65 ; *Guy v. West* (1808), cited in 2 Selwyn N. P. (13th ed.), p. 1244 ; *Henniker v. Howard* (1904), 90 L. T. 157 ; *Craven (Earl) v. Pridmore* (1902), 18 T. L. R. 282. See also *Marshall v. Taylor*, [1895] 1 Ch. 641 ; *Simcox v. Yardley Rural District Council* (1905), 69 J. P. 66.

(*b*) *Vowles v. Miller* (1810), 3 Taunt. 137, at p. 138.

(*c*) *Guy v. West*, *supra*.

(*d*) *Marshall v. Taylor*, [1895] 1 Ch. 641, at pp. 647, 649.

must be ascertained by proving acts of ownership (*e*). Such acts are *prima facie* evidence that the person exercising them is owner of the bank, hedge or ditch, and if the adjoining owners on each side concurrently exercise acts of ownership, these facts are evidence of a tenancy in common in the bank, hedge or ditch (*f*). But if it be known upon whose land a bank, hedge, ditch or wall exists, proof of acts of ownership will avail nothing towards establishing a tenancy in common (*g*).

SECTION 2.—MAINTENANCE AND REPAIR OF FENCES.

No Common Law Obligation to Fence.—There is no obligation at common law upon a landowner to erect and maintain fences round his land (*h*). Consequently, if a man's neighbour enlarges animals upon his land, and by reason of the absence of a sufficient fence the animals stray on to the first-mentioned owner's land and there suffer damage, the first-mentioned owner is not liable (*i*). On the other hand, however, in the instance we have taken, the neighbour is liable for the damage done by his straying animals (*k*). In other words, the necessity

(*e*) *Guy v. West*, *supra*, at p. 1297; Woolrych on Fences, 283.

(*f*) Woolrych on Fences, 283. As to tenancy in common in such things, see pp. 127, 204. *post*. As to party walls, see pp. 127 *et seq.*, *post*. It would appear that a partition action may be brought to partition the tenancy in common of a fence (*Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508).

(*g*) *Matts v. Hawkins* (1813), 5 Taunt. 20.

(*h*) *Star v. Rookesby* (1710), 1 Salk. 335; *Churchill v. Evans* (1809), 1 Taunt. 529; *Boyle v. Tamlyn* (1827), 6 B. & C. 329; at p. 337; *Hilton v. Ankesson* (1872), 27 L. T. 519; *Coaker v. Willcocks*, [1911] 2 K. B. 124, at p. 127 [C. A.].

(*i*) *Fletcher v. Rylands*, *infra*.

(*k*) *Fletcher v. Rylands* (1866), L. R. 1 Ex. 265; (1868), L. R. 3 H. L. 330; *sub nom. Rylands v. Fletcher*. See *e.g.*, *Boden v. Roscoe*, [1894] 1 Q. B. 608; *Lee v. Riley* (1865), 18 C. B. (N.S.) 722. The liability of the defaulting owner is limited however to damages arising from the natural results of the trespass (*Cox v. Burbidge*, 13 C. B. 430). Where fowls strayed on to a

of fencing, in general, arises through the operation of the common law rights in respect of land.

A Landowner's Obligation to Confine his Animals to his own Land.—The root principle governing the subject was laid down in the Exchequer Chamber by BLACKBURN, J. (l), in the following terms: "The person who for his own purposes brings on his lands and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. . . . The person whose grass or corn is eaten down by the escaping cattle of his neighbour . . . is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."

Consequently, if a landowner fails to fence in his land so as to prevent animals on his land escaping on to his neighbour's land, he is liable for the consequences of such escape (m).

This being the law it is clear that it is every man's interest to erect and maintain fences upon his own land. On the other hand, if a fence is already subsisting on the boundary of his neighbour's land, the erection of a second fence is generally superfluous, although if his neighbour's

highway and a dog frightened them so that one ran into the plaintiff's bicycle, which upset and injured him, he failed in his claim for damages (*Hudwell v. Righton*, [1907] 2 K. B. 345).

(l) *Fletcher v. Rylands* (1866), L. R. 1 Ex. 265, at p. 279; affirmed (1868), L. R. 3 H. L. 330 (*sub nom. Rylands v. Fletcher*). See also *Boden v. Roscoe*, [1894] 1 Q. B. 608; *Tenant v. Goldwin* (1705), 1 Salk. 360; S. C., 2 Ld. Raym. 1089.

(m) *Lee v. Riley* (1865), 13 W. R. 751; *Ellis v. Loftus Iron Co.* (1874), L. R. 10 C. P. 10.

fence falls into disrepair, and the first-mentioned owner's cattle or animal stray upon the neighbour's land as a consequence of the state of the fence, the first-mentioned owner is, as we have seen, liable for the damage occasioned thereby.

In the generality of cases the difficulty is overcome by the convenient tacit arrangement that both owners make it their business to see that the fence is preserved as an effective one.

Where a man buys part of a field and there is no provision in the contract as to who is to make and maintain the fence which is to be newly erected upon the dividing line, the purchaser must for his own protection erect a fence. There is no obligation upon either the purchaser or the vendor to inclose for the other's benefit. Thus, it has been said that if a man seised of 200 acres enfeoff another of 50 acres, the feoffee is bound to inclose them, and to keep his cattle within the 50 acres, and so is the lord of the residue (*n*).

SECTION 3.—FENCING OBLIGATIONS.

Sub-section 1.—Express Agreements.

Obligations subsisting by Express Agreement.—

Although, as we have seen, there is no obligation at common law upon a landowner to erect and maintain a fence on his boundaries (*o*), it is open to every person to bind himself by contract to make and maintain a fence upon his own land or upon the land of his neighbour.

A man cannot bind his successors in title to repair and maintain a fence. His covenant, however framed, remains merely a personal one, and its breach gives rise only to a right to damages against him personally, and not against subsequent owners of the land (*p*).

(*n*) Dyer, p. 372 b.

(*o*) See p. 95, *ante*. See also, *Lawrence v. Jenkins* (1873), L. R. 8 Q. B. 274.

(*p*) See *In re Drew's Estate, Ex parte Mason* (1866), L. R. 2 Eq. 206 (covenant to repair a private road).

It is only as between landlord and tenant that the burden of a covenant to make, repair and maintain a fence runs with the lessee's estate or interest (*q*). Where this relationship subsists the obligation binds the lessee's interest, and the benefit of the covenant attaches to the reversion immediately expectant upon the determination of the term (*r*).

Sub-section 2.—Fencing against a Common.

Fencing Land Parcel of Land subject to Commonable Rights of Pasturage.—Where there are common rights of pasturage or other similar common rights involving the enlargement of animals, and land, parcel of land subject to such rights, is inclosed, then it may be that it is incumbent upon the owner of the inclosed land to maintain the fences thereof in such a manner as to prevent the animals from doing or suffering injury (*s*).

This obligation to fence inclosed lands as against the owners of the common rights seems to have some connection with the old system of land cultivation which was connected with the manorial system as formerly subsisting. The lord's approvement of the waste was always watched with a jealous eye; for the tendency of all such acts would lean to the prejudice of the free exercise of commonable rights. Enlargement of cattle and other commonable animals was part of the above-mentioned system of agriculture. Were the ordinary rules as to fencing to apply when an inclosure has been effected, the result would be that the fact of inclosure would be to cast an additional liability upon the owners of the enlarged animals because of the increased probability of their animals trespassing.

(*q*) See *Austerberry v. Oldham Corporation* (1885), 29 Ch. D. 750, at pp. 781, 782.

(*r*) *Spencer's Case* (1783), 5 Co. Rep. 16; Smith L. C. (1903 ed.), Vol. I., p. 55.

(*s*) See *Barber v. Whiteley* (1865), 34 L. J. Q. B. 212; *Wells v. Percy* (1835), 1 Bing. N. C. 556.

Consequently there is a general presumption that beasts enlarged on commonable land must be kept from trespassing upon inclosures by the fences made and maintained by those benefiting by the inclosure. "The purpose of inclosing lands is that they may be used as cultivated land," said COCKBURN, C.J., elaborating this principle (*t*), "and since such a use of them, beneficial to the person to whom it is permitted, makes it the more necessary that the land should not be open indifferently to grazing animals, it is more likely that the obligation of preventing a trespass was imposed upon the occupier [of the inclosed land] than on the tenants of the manor, who had rights of common on the waste, formerly exerciseable without any such risks of distress, and who were a varying and uncertain body. Therefore, granting it to be a principle of law that where no obligation to fence is shown upon either of two adjoining landowners, each must take care his own cattle do not stray ; yet a different legal relation arises where there is, on the one hand, a person inclosing from common land, and, on the other, a body of persons entitled by law to exercise commonable rights on the land adjacent."

An instance illustrating the favour which the law bestows upon persons pasturing cattle and other commonable animals (which necessarily involves enlargement and probability of straying) is afforded by the doctrine of what is called common *pur cause de vicinage*. In strictness this is not a right of common at all, but merely an excuse for trespass arising from the necessity of the case (*u*). Where cattle or other commonable animals rightfully enlarged upon one common, stray on to an adjacent common by reason of the absence of feasible means of prevention, the doctrine of common *pur cause de vicinage* may come to the aid of the owners of the animals.

(*t*) *Barber v. Whiteley* (1865), 13 W. R. 774, at p. 775.

(*u*) *Wells v. Percy* (1835), 1 Bing. N. C. 556.

Sub-section 3.—Prescriptive Obligations.

So-called Prescriptive Obligation to Fence.—There is a singular anomaly with regard to the law of fences. It appears to have been at one time a common incident for lands to be charged with the obligation of fencing (*x*). There was an ancient writ upon which a particular form of real or mixed action was founded, whereby the owner of close A. could compel the owner of close B. to maintain the fences between the closes. This writ was known as *de curia claudenda*. The object of repair might of course be either to keep the defendant's cattle from straying upon the plaintiff's land, or to afford, for the plaintiff, a barrier against trespass by his own cattle on the defendant's land (*y*); but beyond all doubt an obligation, however created, might exist, and a real or mixed action be maintained for the fence being in an ineffectual state (*z*).

The writ of *de curia claudenda* was a writ of right and only available for the freeholder (*a*). Unless the land of the plaintiff was actually adjoining the fence the action did not lie (*b*). The action was not available for a

(*x*) See Fitz. Nat. Brev. 127; *Star v. Rookesby*, *infra*; *Nowel v. Smith* (1598), Cro. Eliz. 709; *Faldo v. Ridge*, Yelv. 74; *Anon.* (1674), 1 Ventris, 264; *Holbach v. Warner* (1623), Cro. Jac. 665; *Cheetham v. Hampson* (1791), 4 T. R. 318.

(*y*) That the object of the obligation was not solely the prevention of animals straying from the *quasi*-servient tenement, seems clear from the fact that the owner of the *quasi*-dominant tenement would in any event have had an action for trespass and also the remedy of distress *damage feasant*. Further, it is clear that non-observance of the obligation gave rise to an action on the case for nonfeasance (see *Star v. Rookesby* (1710), 1 Salk. 335). The form of the writ suggests that the non-observation of the obligation was regarded as a nuisance (see Fitz. Nat. Brev. (1794), p. 127). Had the obligation been confined to fencing-in animals on the *quasi*-servient tenement, nuisance would have been out of the question.

(*z*) See the cases cited in note (*x*), *supra*.

(*a*) Fitz. Nat. Brev. (1794 ed.), pp. 127, 128. See *Star v. Rookesby* (1710), 1 Salk. 335, at p. 336.

(*b*) Fitz. Nat. Brev. (1794 ed.), pp. 127, 128.

commoner who merely enjoyed a right of common in the adjoining land ; although the latter had a remedy against the person whose close marched upon the land in which the commoner enjoyed his common, for the commoner could distrain *damage jéasant* the cattle straying from the close (c).

But, it may be asked, had not the commoner some right against the delinquent for damage done to the cattle of the commoner in straying on to the delinquent's land ? The conclusion, it is submitted, is irresistible that a commoner enlarging cattle rightfully upon the waste, or land over which he enjoyed his common, could not be prejudiced by the act of persons inclosing land marching upon the waste or commonable land ; and if the commoner's cattle strayed upon inclosed land by reason of the fence being in a dilapidated condition, the fault was not the fault of the commoner but of the owner of the inclosed land.

Now, reverting to a consideration of the writ *de curia claudenda*, the framing of the writ and of the proceedings in the action shows clearly that the obligation was based upon former user. There is a direction to command A. "that he inclose his land in N. which is open to the nuisance of B. which he ought and hath used to inclose" (d). It is clearly not an obligation on A. by reason of a mere contract between himself and B. The duty is something more. It is a right attaching to the land of B.

Unknown Origin of the Prescriptive Obligation to Fence.—We are left in darkness with regard to the precise origin of this obligation. The question of the origin or original nature of the obligation is, as we shall see, of much more than mere academic interest. The modern view is that such an obligation cannot be created by grant

(c) Fitz. Nat. Brev., *supra*.

(d) For the form of the writ, etc., see Fitz. Nat. Brev. (1794 ed.), p. 127.

so as to subsist as an appurtenant perpetual right in favour of one close, perpetually burdening the adjoining close. If A., the owner of close X., executes a deed whereby he purports to grant as owner of close X., a right to B. as owner of close Y., and to all subsequent owners of close Y., the right of having the fence between the two closes perpetually kept in repair by A. and his heirs and all subsequent owners of close X. ; and if A. by the same deed covenant with B. and the owners for the time being of close Y. that he A. and his heirs and the owners for the time being will at all times thereafter keep the fence in repair—what is the legal effect of such a deed ?

In law it is nothing more than a mere personal covenant. If A. does not observe it B. has a right to sue for damages (e). It is not a covenant running with the land at common law, for there is no tenure between A. and B. It is not a covenant which will be enforced, under the equitable doctrine of notice, against subsequent purchasers or owners of close Y., who acquire that close with notice, because the fulfilment of the obligation involves the commission of acts, in other words, because the covenant is affirmative. It is not an easement *simpliciter*, because it involves the commission of an act by the owner of the *quasi*-servient tenement, and no easement involves an obligation of this kind. In short, such a privilege cannot be created to subsist as a *quasi*-appurtenant right.

It is true that in the example we have given, if the deed were a demise of close X. by B. to A., and B. covenanted to keep up the fence which was parcel of the land demised, then clearly such a covenant would attach to and bind A.'s interest in the land, and the right to enforce it would likewise accrue to the reversion in B., so that the owners for the time being of B.'s reversion could enforce the obligation. But B.'s successors could not prescribe for it, because A. and his successors in title would only be termors who could not grant a right which would bind

(e) See p. 97, *ante*.

the fee ; and every prescription presumes a grant by the owner in fee. In other words, prescription would be out of the question.

It is a well recognised rule of law that a privilege which cannot be granted as a legal entity cannot be prescribed for (*f*). Every prescription presupposes a grant (*g*). If a privilege cannot be granted it cannot be prescribed for. Wherefore, it seems clear that prescription is not, in strictness, the proper term to apply to the mode of establishing the obligation of fencing. There are, however, a great number of authorities which freely use this description of the claim. The use of the term prescription in many of the old authorities is notoriously ambiguous, and it is conceived that the bald proposition that an obligation to fence may be set up as a prescriptive claim is one which tends to mislead and ought only to be accepted with extreme caution.

Whether a Lost Modern Grant Creating the Obligation to Fence can be Presumed.—It is further conceived that the obligation to fence, when based on user, is supportable only on the ground of its being a *quasi*-common law right, or a right in the nature of a customary right established by proof of immemorial user (*h*), or, and perhaps this is the closest analogy, an obligation similar to repair *ratione tenure*. It is submitted that it cannot be regarded as an accessorial right varying the common law natural rights of property by the superaddition of a privilege against common right (*i*). If it were a mere

(*f*) See p. 27, *ante*.

(*g*) See p. 27, *ante*.

(*h*) See the opinion of HOLT, C.J., in *Tenant v. Goldwin* (1705), 1 Salk. 360, at p. 361, and the dicta of FARWELL, L.J., in *Coaker v. Willcocks*, [1911] 2 K. B. 124, at p. 127.

(*i*) It is significant that the very form of the writ seems to imply that the obligation was not a matter of convention (see *per* HOLT, C.J., in *Tenant v. Goldwin* (1705), 2 Raym. 1089, at p. 1092). The case of *Nowel v. Smith* (1598), Cro. Eliz. 709, also supports the view that even at that time the obligation could not be charged

accessorial right varying the common law natural rights of property, like a kind of easement, all the rules which govern prescriptive claims would attach to it, which, as we have shown, they do not.

The conclusions to which the foregoing considerations appear to lead us are these, that the obligation to fence may be charged upon land only where immemorial user can be shown, and that inasmuch as the obligation undoubtedly existed in ancient times, but is not one which can now be newly charged on lands, immemorial user may support it; but the obligation ought not to be supported on the ground of a lost modern grant.

Discussion of the Authorities on the Prescriptive Obligation to Fence.—Now we shall examine the modern authorities which might be cited against this view.

In *Lawrence v. Jenkins* (*k*) the plaintiff claimed damages for the loss of his cow, which had strayed from his close through a hedge into the defendant's wood adjoining. The gap in the hedge had been caused by the felling of a tree in the defendant's wood, and the cattle passing through the gap had eaten yew tree leaves and died. The plaintiff alleged that there was an obligation upon the defendant to maintain the fence. Evidence was given to the effect that for more than forty years the owners of the defendant's wood had repaired the fence, and on several occasions this had been done on the request or notice of the plaintiff's predecessors in title. The county court judge found, as a fact, that there was an obligation on the part of the defendant to repair and keep in repair the

by grant so as to bind the land. POPHAM, J., considered that as every prescription supposed a grant, the fact that the obligation could be claimed by prescription showed that a new grant could be made. But the other judges did not agree, holding that the remedy under such a grant was the action on the covenant, which was purely personal. It is to be observed, however, that the dicta of BAYLEY, J., in *Boyle v. Tamlyn*, are opposed to the view stated in the text. See the latter case discussed more fully on p. 106, *post*.

(*k*) (1873), L. R. 8 Q. B. 274.

fence for the purpose of preventing the cattle in the plaintiff's close from escaping.

The case came before the Court of Queen's Bench on appeal. In that court the validity of a prescriptive obligation to fence does not appear to have been challenged by the defendant. The defence was confined to a contention that the obligation only arose after notice, and that the defendant was not liable for the negligence of his servants in felling the tree.

ARCHIBALD, J., in delivering the judgment of the court, cited Gale on Easements (*l*), *Star v. Rookesby* (*m*), and *Boyle v. Tamlyn* (*n*), in support of the validity of a prescriptive obligation to fence. His lordship pointed out that the writ *de curia claudenda* was formerly the mode of enforcing the obligation, and referred to *Nowel v. Smith* (*o*), as showing that the prescription to fence was a good plea. He cited an anonymous case in *Ventris* (*p*), *Rooth v. Wilson* (*q*), and *Powell v. Salisbury* (*r*), as establishing the delinquent's liability for consequences of the fence being out of repair; and found the defendant liable to the plaintiff, notwithstanding that he had no knowledge of the injury done to the fence.

With regard to this case we may observe that, although the validity of the prescriptive obligation does not appear to have been deliberately challenged, the court sanctioned that validity. It does not appear from the report of the

(*l*) 4th ed., p. 460.

(*m*) (1710), 1 Salk. 335.

(*n*) (1827), 6 B. & C. 329, at pp. 337—339.

(*o*) (1598), Cro. Eliz. 709. See p. 100, *ante*.

(*p*) (1674), 1 Ventris, 264. This was an action on the case in which the plaintiff declared that the defendants (the tenants and occupiers of a certain piece of land adjoining the plaintiff's land) had time out of mind maintained a fence, and that the fence being out of repair, the plaintiff's mare went through the gap and fell into the ditch and was drowned.

(*q*) (1817), 1 B. & Ald. 59. See p. 107, *post*.

(*r*) (1828), 2 Y. & J. 391.

case whether the claim was set up as one based on an immemorial obligation.

Now with regard to the cases cited in the judgment in the last-mentioned case. In *Star v. Rookesby* (s), the cattle strayed from the *quasi-servient* tenement on to the *quasi-dominant* tenement. Under these circumstances it is strange that the plaintiff should have put himself to the pains of setting up a prescriptive obligation for the defendant to keep up the fence. It is difficult to see how at common law the defendant would not have been bound to retain his cattle by repairing the fence; yet the court stated that: "This is a charge upon the defendant against common right; for the law bounds every man's property and is his fence, and this is obliging another to make a fence for him."

In *Boyle v. Tamlyn* (t) there was a fence and gate separating the plaintiff's land from that of the defendant, but both the hedge and fence were upon the defendant's land. The gate being removed, the plaintiff's cattle escaped. At Nisi Prius the jury found that the defendant was bound by agreement to repair the fence. A rule *nisi* for entering a non-suit having been obtained, the plaintiff showed cause. The fact that the defendant or his tenants had from time to time repaired the gate on the plaintiff's request, it was contended, raised a *primâ facie* inference that the defendant was under an obligation to make the repairs. In answer to this, the defendant contended that the evidence of user was referable to the defendant's obligation to keep in his own cattle, and, being so referable, could not support an obligation in favour of the plaintiff. It was further contended on behalf of the defendant that as the two pieces of land had been some thirty years previously in common ownership, the obligation must have arisen since then; that it must have been created by deed; and that no deed having been produced, it must be taken that it never existed.

(s) (1710), 1 Salk. 335.

(t) (1827), 6 B. & C. 329.

The court made the rule absolute for a new trial. BAYLEY, J., in his judgment, in which HOLROYD and LITTLEDALE, JJ., concurred, adopted the view that the obligation ("if any such there be") must have arisen by deed within thirty years. "Such a right," he said, "to have fences repaired by the owner of adjoining lands, is in the nature of a grant of a distinct easement, affecting the land of the grantor." His lordship considered that there was some (though very slight) evidence to go to the jury, that the defendant was bound to repair, for the fence might be considered a mutual benefit to both, and that unless one was bound to repair, it might have been fairly expected that both would have contributed to the repairs, whereas it was proved that the defendant alone had done so.

Here, we have a direct expression of opinion that the obligation can be presumed to have arisen by a lost modern grant, and, inferentially, that such an obligation can be annexed as an easement by grant. It is submitted that this is not the law. The reasons for our view have already been stated.

Rooth v. Wilson (u) is not an authority that an obligation to repair a fence can be claimed by prescription. There the liability was admitted (x). The plaintiff was a mere bailee of the animal which had been killed by reason of the absence of a sufficient fence, and the case turned upon the point whether the plaintiff, as a mere bailee, could under the circumstances maintain the action. It was held that he could.

In the recent case of *Coaker v. Willcocks* (y), the question of the obligation to fence came before the Court of Appeal, but unfortunately not in the form in which it would have been open to the court to adjudicate on the validity of a prescriptive obligation.

(u) (1817), 1 B. & Ald. 59.

(x) It does not appear that this liability was based on user. It was probably the outcome of a mere personal agreement.

(y) [1911] 1 K. B. 649 ; S.C., [1911] 2 K. B. 124.

The defendant was the occupier of a "new take" or farm inclosed from land which was part of the forest of Dartmoor. The plaintiff enjoyed the right of pasturing sheep and commonable beasts on the uninclosed lands of the forest. The plaintiff's sheep, being rightfully at large on the uninclosed lands, strayed through the fence, and were distrained *damage feasant* by the defendant and impounded. The propriety of the impounding was called in question.

It appears to have been admitted by the defendant that he was bound to keep up a sufficient fence against commonable animals, including ordinary sheep, on the uninclosed land. The plaintiff's sheep were Scotch sheep, which are possessed of powers of jumping fences which would otherwise be effective against other sheep; and the substantial question for the court appears to have been, whether the defendant's liability to fence out ordinary sheep amounted to an obligation to fence out Scotch sheep also. The court found that the obligation did not extend to the fencing out of Scotch sheep.

Both VAUGHAN-WILLIAMS and FARWELL, L.JJ. (z), intimated their regret that the form in which the case came on appeal did not admit of an investigation into the origin of the right, which the plaintiff claimed, of having the defendant's land fenced off from the common (a).

Mode of Laying the Prescription.—It has always been sufficient for a person, seeking to establish a prescriptive obligation upon another to repair a fence, to plead that the fence used to be, and still ought to be, repaired by the owners and occupiers of the *quasi-servient* tenement, and to plead that the defendant is in possession of that tenement (b). The plaintiff was never required to show the precise nature of the defendant's interest in the tenement.

(z) [1911] 2 K. B., at pp. 129, 131.

(a) As to fencing against a common, see p. 98, *ante*.

(b) See *Faldo v. Ridge*, Yelv. 74; *Nowel v. Smith* (1598), Cro. Eliz. 709; *Rider v. Smith* (1790), 3 T. R. 766.

The reason for this is, that the plaintiff was presumed to be a stranger to the defendant's title, and therefore unable to plead or show the nature of that title (*c*). But a possessory action on the case for the non-repair of fences could not be supported against the owner of the inheritance who was not in possession (*d*) ; such an action was required to be brought against the tenant in possession (*e*).

Difficulties of Adducing Evidence which will Support the Obligation.—Whatever may be the state of the authorities with regard to the possibility of the obligation being set up on a presumed modern grant of the right, it is clear that there is a practical difficulty which the claimant must face when seeking to charge a defendant with the obligation. The onus lies on the claimant (*f*). The obligation, if any, must rest on user (*g*). Now, the only acts of user in a case of this kind are acts of repair by the defendant and his predecessors in title. But acts of repair by the defendant and his predecessors are clearly more naturally referable to an intention to avoid the liability which would ensue if animals upon the alleged *quasi*-servient tenement escaped through a hedge, than to any fulfilment of an obligation to keep out the cattle of the plaintiff and his predecessors.

*Sub-section 4.—Common Law Obligations to Fence
Excavations.*

Obligation of Fencing imposed by Common Law on Persons Making Excavations.—When a man rightfully excavates upon land belonging to another, or upon land

(*c*) *Faldo v. Ridge, supra* ; *Nowel v. Smith, supra* ; *Rider v. Smith, supra*.

(*d*) *Cheetham v. Hampson* (1791), 4 T. R. 318 ; *Rider v. Smith, supra*.

(*e*) *Cheetham v. Hampson, supra*.

(*f*) *Coaker v. Willcocks*, [1911] 2 K. B. 124 (FARWELL, L.J.)

(*g*) See p. 20, *ante*.

over which another has the right of depasturing animals, there is an obligation upon him, at common law, to fence the excavation (*h*). Thus, it was held that a licensee of the owner of the surface who had sunk a shaft and had allowed the shaft to remain imperfectly fenced, was liable to a person lawfully enlarging horses upon the surface, for the loss of one of the horses which was killed by falling down the shaft (*i*). Again, where a person had enjoyed an exclusive right of depasturing animals upon certain lands, and his animals strayed into a stone quarry on the land, and damaged the stones, it was held that the person who had the right of quarrying the stone could not distrain the animals *damage feasant*, for it was his duty to fence out the animals (*k*).

Excavations adjoining a Highway.—At common law a man may not excavate so near a highway as to endanger persons using the highway (*l*). If he does so he is liable on the ground of nuisance (*m*). “When an excavation is made adjoining to a public way,” said POLLOCK, C.B. (*n*), “so that persons walking upon it might, by making a false step, or being affected by sudden giddiness, or in the case of a horse or carriageway, might, by the sudden starting of the horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences.” Consequently if a man make such an excavation it is his duty to fence it so as to prevent any mischief of this kind (*o*).

(*h*) *Groucott v. Williams* (1863), 4 B. & S. 149 ; *Churchill v. Evans* (1809), 1 Taunt. 529.

(*i*) *Groucott v. Williams*, *supra*.

(*k*) *Churchill v. Evans* (1809), 1 Taunt. 529.

(*l*) *Coupland v. Hardingham* (1813), 2 Camp. 398 ; *Barnes v. Ward* (1850), 9 C. B. 392 ; *Hadley v. Taylor* (1865), L. R. 1 C. P. 53.

(*m*) *Hadley v. Taylor*, *supra*.

(*n*) *Hardcastle v. South Yorkshire Rail. Co.* (1859), 4 H. & N. 67.

(*o*) See *Hounsell v. Smyth* (1860), 7 C. B. (N.S.) 731.

At common law there is no prescribed distance from a highway at which an owner may excavate. The proper legal test is whether the excavation is substantially adjoining the highway (*p*).

Excavating Owner not Liable for Damage caused to Trespassers.—A person who has excavated is not liable for the damage caused by reason of his excavations to persons who are mere trespassers upon the land. Thus, where a man made an excavation in land over which other persons enjoyed rights of common, and the mare of a third strayed upon the land and fell into the excavation, it was held that no action lay in favour of the third party against the person making the excavation, the loss of the third party being *damnum sine injuria* (*q*). Again, where an action was brought under Lord Campbell's Act to recover compensation for an accident occurring to a person who had strayed off the highway and had fallen into an open excavation made by the defendants while constructing a reservoir, it was held that the defendants were not liable, because the excavation was made some distance from the way, and the person killed was a trespasser on the defendant's land before reaching the excavation (*r*).

Excavating Owner not Liable for Damage caused to Persons making an improper Use of the Highway.—An owner of land who has excavated near a highway is not liable for the damage caused by reason of his excavations to persons who are not making a proper use of the highway. Thus, as we have seen, it was held that the defendants were not liable for an accident occurring to

(*p*) See *per* POLLOCK, C.B., in *Harcastle v. South Yorkshire Rail. Co.* (1859), 4 H. & N. 67; *Hounsell v. Smyth*, *supra*. As to the statutory obligation to fence shafts and similar excavations situated within a prescribed distance of a highway, see p. 118, *post*.

(*q*) *Blyth v. Topham* (1607), Cro. Jac. 158.

(*r*) *Harcastle v. South Yorkshire Rail. Co.* (1859), 4 H. & N. 67.

a person who had strayed from the highway and had fallen into an open excavation made by the defendants while constructing a reservoir (*s*).

No Liability for the Subsistence of Ancient Excavations near a Highway.—A landowner is not at common law bound to fence in an old excavation which has been on his land adjoining the highway from time immemorial. Thus, where commissioners of sewers had availed themselves of an ancient dyke lying beside a highway, and had used it as a sewer without fencing it off from the highway, it was held that they were not liable for the damage sustained by a person whose horse shied and fell with him and his cab into the sewer (*t*). Where a highway is newly dedicated, the rights of the public in respect of the highway are subject to the inconveniences of the proximity of existing excavations and ditches (*u*).

The Obligation on Third Parties to Maintain a Fence does not relieve an Owner from the Consequences of Excavating too close to a Highway.—Because third parties are charged with the obligation of maintaining a fence by the side of a highway, an excavating owner whose excavations adjoin a highway is not necessarily

(*s*) *Hardcastle v. South Yorkshire Rail. Co.*, *supra*.

(*t*) *Cornwell v. Metropolitan Commissioners of Sewers* (1855), 10 Ex. 771. "Assuming," said POLLOCK, C.B., at p. 773, "that the commissioners were the owners of the sewer, they were under no obligation to protect the highway. The owner of land adjoining a highway is not bound to fence a pit on his land. In this country there are some hundreds of miles of highways, on the sides of which there are ditches; but nobody ever supposed that the owners were under any obligation to fence them." "This is not the case of a new sewer," said PARKE, B., at p. 774, "and therefore we may dispense with the consideration of what the commissioners are bound to do when they make a sewer. This is an ancient sewer which has existed with the highway time out of mind, and therefore the public have only a right to the highway subject to the sewer."

(*u*) *Cornwell v. Metropolitan Commissioners of Sewers*, *supra*; *Fisher v. Prowse* (1862), 2 B. & S. 771; *Robins v. Jones* (1863), 15 C. B. (N.S.) 221.

relieved from the consequences of his act (*x*). Thus, an owner who had excavated in a bank adjoining a newly-made highway, was held liable for the damage caused to a person who fell into the excavation while walking along the highway in the dark ; although a board of works was required by a private statute to build and fence the highway (*y*).

Sub-section 5.—Statutory Obligations upon Railway Companies to Fence their Lines.

Fences between Railways and the adjoining Land.—

By the Railways Clauses Consolidation Act, 1845 (*z*), it is enacted, that, subject to the provisions and restrictions contained in the Act and in any special Act or Acts incorporated therewith, it shall be lawful for any railway company, for the purpose of their railway or the accommodation works required to be executed therewith, to make or construct, in, upon, across, under, or over any lands or streets, hills, valleys, roads, railroads, tramroads, rivers, canals, brooks, streams, or other waters within the lands described in the deposited plans or mentioned in the books of reference thereto or in any correction thereof, such fences as they think proper ; and they may from time to time alter, repair or discontinue them, and substitute others in their stead, and do all other acts necessary for making, maintaining, altering or repairing, and using the said railway—the company nevertheless, in the exercise of the powers granted to them, doing as little damage as possible, and making full satisfaction in the manner pointed out by the Act for all injury done by them in the exercise of such powers.

The same Act (*a*) requires the company to make, and at all times maintain, for the accommodation of

(*x*) *Wetter v. Dunk* (1864), 4 F. & F. 298.

(*y*) *Wetter v. Dunk*, *supra*.

(*z*) 8 & 9 Vict. c. 20, s. 16.

(*a*) 8 & 9 Vict. c. 20, s. 68.

the owners and occupiers of lands adjoining the railway, sufficient posts and rails, hedges, ditches, and mounds, or other fences, for separating the lands taken for the use of the railway from the adjoining lands not so taken, and for protecting such adjoining lands from trespass, and for preventing the cattle of the owners or occupiers thereof from straying thereout. It also requires the company to make and maintain all necessary gates and stiles in such fences, etc. ; and requires the gates to be made to open towards such adjoining lands and not towards the railway.

The Act also contains divers provisions with regard to the making of accommodation works for the benefit of the adjoining landowners and others, by the company ; and bestows powers in certain events upon the adjoining owners to make accommodation works in the case of the company's default (b).

Statutory Obligations to Fence in favour of Adjoining Owners.—The obligation to keep up fences which is imposed upon the railway company by the Act, exists only as between the company and the owners and occupiers of the adjoining lands (c). No duty on the part of a railway company arises, under that section, towards its own passengers ; that is to say, if an accident happens to a train in consequence of cattle straying on the line through the fences being out of repair, the passengers, if they are to succeed in an action for the injuries so received, must rely, not upon the above-mentioned section, but upon the common law duty imposed upon the company to take reasonable care that accidents do not happen in consequence of the line being imperfectly protected

(b) 8 & 9 Vict. c. 20, ss. 69—74.

(c) See 8 & 9 Vict. c. 20, s. 68 ; *Buxton v. North Eastern Rail. Co.*, *infra* ; *Ricketts v. East and West India Docks, etc. Rail. Co.* (1852), 12 C. B. 160 *Cf. Harrold v. Great Western Rail. Co.* (1866), 14 L. T. 440 ; *Child v. Hearn* (1874), L. R. 9 Ex. 176.

against cattle, where it is probable that they will stray upon it (*d*).

It has been held that the liability of a railway company to make and maintain fences along their line is not more extensive than the liability of an ordinary landowner, in a case where such landowner is bound by prescription to repair fences for the benefit of his neighbour ; that is to say, the liability of the railway company is a liability only as between the company and the adjoining owner ; in other words, the Act only requires the company to fence against cattle which are lawfully using the adjoining land (*e*).

Fences of Railways running beside Highways.—

Where the railway runs by the side of a highway, the highway is to be considered as adjoining land within the Act ; and therefore the company must fence against cattle which are lawfully using the highway (*f*) ; and this is so, notwithstanding that (apart from statute) private individuals whose properties adjoin the highway are under no obligation to fence, unless against some special danger (*g*). An estray which is being driven home is lawfully on the highway ; and if it meets with injury in consequence of the fences being dilapidated contrary to the statutory duty of the company to repair, the company will be responsible (*h*).

(*d*) 8 & 9 Vict. c. 20, s. 68. See also *Sharrod v. London and North Western Rail. Co.* (1849), 4 Exch. 580 ; *Buxton v. North Eastern Rail. Co.* (1868), L. R. 3 Q. B. 549.

(*e*) *Ricketts v. East and West India Docks Rail. Co.* (1852), 12 C. B. 160, 174. See also *Corry v. Great Western Rail. Co.* (1880), 6 Q. B. D. 237 ; 7 Q. B. D. 322.

(*f*) *Manchester and Sheffield Rail. Co. v. Wallis* (1854), 14 C. B. 213.

(*g*) *Potter v. Parry* (1859), 7 W. R. 182. See pp. 110 *et seq.*, *ante*, and pp. 177 *et seq.*, *post*.

(*h*) *Midland Rail. Co. v. Daykin* (1855), 17 C. B. 129.

Sub-section 6.—Statutory Obligations upon Mineowners to Fence Shafts, etc.

Coal Mines Act, 1911.—With regard to all coal mines, and mines of stratified iron-stone, mines of shale, and mines of fire-clay—it is provided by the Coal Mines Act, 1911 (*i*), that every entrance to any place below ground in a mine which is not in actual course of working or extension shall be properly fenced across the whole width of the entrance, so as to prevent persons inadvertently entering the same (*k*) ; that the top of every shaft which for the time being is out of use, or used only as a ventilating shaft, shall be securely fenced (*l*) ; that the top and all entrances between the top and bottom of every working ventilating or pumping shaft shall be properly fenced—but not so as to prevent the temporary removal of the fence for the purpose of repairs or other operations if proper precautions are used (*m*) ; that every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall be and be kept securely fenced (*n*).

Fencing Abandoned Mines under the Coal Mines Act, 1911.—With regard to mines which are abandoned or which cease to be worked, the same Act provides that the owner of the mine and every other person interested therein shall cause the top or entrance of every shaft and outlet to be kept surrounded by a structure of a permanent character sufficient to prevent accidents (*o*). Any

(*i*) 1 & 2 Geo. 5, c. 50, repealing 50 & 51 Vict. c. 58. The latter statute had been amended by 59 & 60 Vict. c. 43. It repealed, but in substance re-enacted, the provisions of the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76).

(*k*) 1 & 2 Geo. 5, c. 50, s. 37 (1).

(*l*) *Ibid.*, s. 37 (2).

(*m*) *Ibid.*, s. 37 (3).

(*n*) *Ibid.*, s. 55.

(*o*) *Ibid.*, s. 26 (1).

shaft or outlet which is not kept surrounded by a structure as required by s. 26 of the Act, is to be deemed to be a nuisance within the meaning of s. 91 of the Public Health Act, 1875 (*p*).

Other Mines.—With regard to all mines other than those to which the Coal Mines Act, 1911, applies, it is provided by the Metalliferous Mines Regulation Act, 1872 (*q*), that certain rules, general and special, shall be observed in every such mine (*r*) ; and, accordingly, the top of every shaft which was opened before the commencement of the actual working for the time being of the mine, and has not been used during such actual working, must, if so required in writing by the inspector of the district, be securely fenced (*s*) ; so, the top of every other shaft which for the time being is out of use, or used only as an air-shaft, must be securely fenced (*ss*) ; and the top and all entrances between the top and bottom of every working or pumping shaft shall be properly fenced,—but not so as to prevent the temporary removal of the fence for the purpose of repairs or other operations if proper precautions are used (*t*). Various penalties are imposed upon persons offending against the provisions of the Act (*u*), which are, by the Quarries Act, 1894 (*x*),

(*p*) 1 & 2 Geo. 5, c. 50, s. 26 (3).

(*q*) 35 & 36 Vict. c. 77. See also 38 & 39 Vict. c. 39.

(*r*) 35 & 36 Vict. c. 77, s. 23.

(*s*) *Ibid.*, r. 6.

(*ss*) As to the fencing of abandoned mines of this description, see 35 & 36 Vict. c. 58, s. 13 ; *Evans v. Mostyn* (1877), 2 C. P. D. 547 ; *Foster v. Owen* (1892), 9 T. L. R. 22 (a case on the sufficiency of the fencing).

(*t*) 35 & 36 Vict. c. 77, s. 23, r. 7. As to what amounts to a “working” shaft, see *Foster v. North Hendre Mining Co.*, [1891] 1 Q. B. 71.

(*u*) 35 & 36 Vict. c. 77, ss. 31—38. See also the Summary Jurisdiction Acts of 1884 and 1887.

(*x*) 57 & 58 Vict. c. 42.

extended, with some modifications, to quarries for getting slate, stone, coprolites, etc., whenever the depth in any part of the quarry exceeds twenty feet.

Fencing Shafts, etc., sunk or made near Highways.

—With respect to the sinking of pits or shafts by the owner of land in proximity to carriageways or cartways, it was provided by the Highway Act (*y*), that no person should thereafter sink any pit or shaft, or erect any steam engine or other like machine, within the distance of twenty-five yards, or any windmill within the distance of fifty yards, from any part of any carriageway or cartway, unless such pit, shaft, steam engine, or windmill be within some house or other building or behind some wall or fence, sufficient to conceal or screen the same from the carriageway or cartway, so that the same may not be dangerous to passengers, horses, or cattle; but erections of the specified character in existence at the time of the passing of the Act may be still used, and also be repaired and rebuilt or even enlarged. It is also provided that the surveyors of highways are to fence holes dug by them for the purpose of getting materials for the repair of the highways (*z*).

Dangerous Machinery.—We may here add that there are various statutory enactments requiring dangerous machinery to be safely fenced. These provisions are too various to be dealt with in a book of this kind, and consequently it is not proposed to pursue this subject further (*a*).

(*y*) 5 & 6 Will. 4, c. 50, s. 70.

(*z*) 5 & 6 Will. 4, c. 50, s. 55; *Morgan v. Leach* (1842), 10 M. & W. 558.

(*a*) See 54 & 55 Vict. c. 75; 58 & 59 Vict. c. 37.

CHAPTER V.

BARRIERS BETWEEN MINES.

SECT.	PAGE
1.— <i>Rights in Respect of Barriers in Mines...</i>	119
2.— <i>Remedies available for Wrongs done in respect of Mines</i>	123

SECTION 1.—RIGHTS IN RESPECT OF BARRIERS IN MINES.

Barriers in Mines.—We have already pointed out how subterranean masses may be the subject-matter of ownership distinct from the ownership of the surface above them, and from the ownership of the divers masses which lie beside or above or below them (*a*). When the owners of such masses proceed to deal with their property for profit by abstracting such parts thereof as have a particular value, as is the common practice in mining districts, the law imposes upon them the obligation of paying due regard to the equal rights of other owners. Of these rights the two most important are the right to freedom from subsidence caused by withdrawal of support, and the right to freedom from flooding resulting from the working of adjoining property. The due observance of these rights is usually secured by leaving masses of minerals and other substances in their natural state and position. These masses when so left are called barriers (*aa*).

Apart from any countervailing right acquired by his neighbour in the nature of an easement, every man is entitled at common law to excavate up to the very edge of his own property, provided in so doing he does not disturb

(*a*) See p. 2, *ante*.

(*aa*) For the statutory provisions for securing roofs and sides in mines for the safety of miners, see the Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), ss. 49—52.

the right of support, to which his neighbour's land, while unencumbered by buildings, is entitled *ex jure naturæ* (b). He may work up to the extreme limits of his property, even although in so doing he may cut away the only barrier which exists between his own mine and the one adjoining (c).

Water Gravitating in the Course of Nature.—Where two mines lie contiguously, one being worked at a higher level than the other, the proprietor of the lower mine is under a natural servitude to the proprietor of the upper mine to receive all water which finds its way down into the lower mine by natural gravitation.

Thus, where it appeared that the plaintiff was possessed of a colliery, and that the defendant was possessed of the colliery adjoining, which was upon a higher level than the plaintiff's colliery, and that, at the time the defendant became possessed of his colliery, there were three large holes, called thyrlings, existing in the barrier between the two mines,—this barrier being wholly within the plaintiff's colliery, and the thyrlings having been made by a previous owner of the defendant's colliery, between whom and the defendant there was no privity, either of contract or of estate,—and it also appeared that in the course of winning the coal from his colliery, the defendant broke open a natural subterranean reservoir of water, the existence of which was well known to him, and the water flowed down to the thyrlings before mentioned, and through them into the plaintiff's colliery, where it did considerable damage, it was held that the defendant was not liable, for the reason that it was the natural right of each of the owners of two adjoining coal mines—neither being subject to any servitude to the other—to work his own mine in the manner most convenient and beneficial to himself, although the natural consequence might be, that some damage would

(b) See p. 70, *ante*.

(c) *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330 ; *Smith v. Kenrick* (1849), 7 C. B. 564. See also *Williams v. Bagnall* (1867), 15 W. R. 272.

accrue to the owner of the adjoining mine, so long as such damage did not arise from the negligent or malicious conduct of the party (*d*).

Water Brought into the Upper Mine by Artificial Means.—The proprietor of a lower mine is not obliged to receive water which has been brought into the upper mine by artificial means ; and therefore, if the owner of the upper mine diverts a stream, *e.g.*, so as to bring it on his own land,—or, by any other means, brings foreign water on his own land,—he must get rid of this water in some other way than by sending it down, or leaving it to find its own way down, into the workings in the adjoining mine (*e*),—unless, of course, he is able to show a prescriptive or other right or title authorising him to send such water down or leave it to find its way down (*f*).

In the important case of *Rylands v. Fletcher* (*g*), the plaintiff was the lessee of certain mines, and the defendant was the owner of a mill, the site and surface of which adjoined the surface lands under which the mines were

(*d*) *Smith v. Kenrick*, *supra*, in which case it was observed by CRESSWELL, J., who delivered the judgment of the court, that “Here the working of the two mines has been simultaneous ; but the defendant’s mine not being subject to any servitude, what authority is there for saying that the plaintiff, by working his coal, can alter or abridge the defendant’s right to work his also ? Surely the reasonable thing is, that the plaintiff shall leave part of his own coal, to protect his own workings against the influx of water ; and, in fact, the plaintiff appears to have taken that view ; for he left a barrier, which would have been sufficient for the purpose, had it not been broken through by a wrong-doer ; but the defendant is not responsible for that wrongful act ” (citing *R. v. Commissioners of Sewers for Pagham Level* (1828), 8 B. & C. 774 ; Dig. lib. 39, tit. 3).

(*e*) *Baird v. Williamson* (1864), 15 C. B. (N.S.) 376 ; *West Cumberland Iron and Steel Co. v. Kenyon* (1879), 11 Ch. D. 782 ; *Lomax v. Stott* (1870), 39 L. J. Ch. 834 ; *Fletcher v. Smith* (1877), 2 App. Cas. 781 ; *Snow v. Whitehead* (1884), 27 Ch. D. 588 ; *John Young & Co. v. Bankier Distillery Co.*, [1893] A. C. 691, at pp. 697, 701.

(*f*) See *e.g.*, *Chadwick v. Marsden* (1865), L. R. 2 Ex. 285 ; *Anderson v. Oppenheimer* (1880), 5 Q. B. D. 602 ; *Mundy v. Rutland* (1882), 23 Ch. D. 81.

(*g*) (1868), L. R. 3 H. L. 330.

worked. The defendant, desiring to construct a reservoir on his own surface lands, employed a competent engineer and a contractor for that purpose. These persons neglected, or at all events took no care to block up, certain vertical shafts that connected certain old passages of disused mines, at a spot up to which the plaintiff had worked his mines, with the surface lands above. These disused shafts had been filled up with marl and earth. In consequence of the weight of the water one of the old shafts burst, and the water flowed down through the old passages and flooded the plaintiff's mine. The court held that the defendant was liable for the injury so done ; for having brought on to his land something liable to do damage if it escaped, he was bound to keep it within bounds at his peril.

It seems to follow that, where a mining lessee or a mine owner has even wrongfully perforated the barrier between his own mine on the dip and the mine of the adjoining mine owner on the rise, the latter has no right to make a convenience of the openings for the purpose of conducting water from his mine by artificial means, and so as to cause more of it to flow down to his neighbour's mine, than would find its way there by natural gravitation (*h*).

A mine owner or mining lessee, who, as we have seen, is not responsible for an injury caused by the natural percolation of water from his mine, or by the natural descent of water, that is not foreign water, from his mine, into the adjoining mine, is also not responsible if the workings in his own mine stop the percolation of the water from his own into the neighbouring soil, or cause the drying up of wells, etc., on the neighbouring property (*i*).

(*h*) *Westminster Brynbo Coal Co. v. Clayton* (1867), 36 L. J. Ch. 476.

(*i*) *Acton v. Blundell* (1844), 12 M. & W. 324 ; *Chasemore v. Richards* (1859), L. R. 7 H. L. 349 ; *Popplewell v. Hodgkinson*

SECTION 2.—REMEDIES AVAILABLE FOR WRONGS
DONE IN RESPECT OF MINES.

Injunctions.—A mine owner or lessee who so works his mine as to cause damage, either by unlawfully allowing water to pass into his neighbour's mine (*k*), or by depriving his neighbour's property of the support afforded by his own property to that of his neighbour (*l*), may be restrained by injunction from so doing.

Even where no damage has in fact accrued, an injunction may be obtained if damage is imminent and certain (*m*).

Damages where subsequent Subsidences may Occur.

—A person whose mine is affected by the wrongful act of his neighbour can sue for damage thereby occasioned. It is a general rule that damages must be assessed once and for always, in respect of the one wrong (*n*). The application of this rule to cases of subsidence arising from wrongful deprivation of support has led to difficulty (*o*). When support is removed, subsidences may occur from time to time at considerable intervals of time. The question therefore arises whether, when damage has resulted from a subsidence due to the deprivation of support, damages ought to be awarded for the mere prospective damage which may or may not in fact occur in future. High authorities differed with regard to this. It is, however, now settled that, as the successive subsidences

(1869), L. R. 4 Ex. 248 ; *Elliott v. North Eastern Rail. Co.* (1863), 10 H. L. Cas. 333. Cf. *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217.

(*k*) See *e.g.*, *Mundy v. Rutland (Duke)* (1882), 23 Ch. D. 81.

(*l*) See *e.g.*, *Proud v. Bates* (1865), 34 L. J. Ch. 406 ; *Mundy v. Rutland (Duke)*, *supra*.

(*m*) *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127.

(*n*) See *Darley Main Colliery Co. v. Mitchell*, *supra*, at p. 133.

(*o*) As to the question of the application of the Statutes of Limitation in respect of actions of this kind where there are successive subsidences, see p. 73, *ante*.

are in truth fresh causes of action (*p*), and as damages caused by such subsequent subsidences ought to be awarded in fresh actions, mere prospective damage due to possible subsidences ought not to be taken into account (*q*).

Inspection of Mines.—From the nature of the case, it is generally a very difficult matter for a particular owner to ascertain definitely whether a neighbouring mine-owner is, in fact, so working his mine as to commit a wrong. His land may be prejudicially affected by some cause or other, but he may not know for certain the exact cause, which is generally hidden in the bowels of the earth. Inasmuch as he cannot, in general, enter his neighbour's property where he believes the mischief is being caused, without requisite authority, it follows that were that authority not furnished by the court, serious injustice might be caused.

The court has long exercised jurisdiction as regards inspection. Now, by Order L, r. 3, of the Rules of the Supreme Court, the court or a judge, upon the application of any party to a cause or matter, may make an order, upon such terms as may be just, for the inspection of any property or thing, being the subject-matter of such cause or matter; and may authorise any person to enter upon any land in the possession of any party to such cause or matter, and may authorise any observations to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

The principle on which the court acts in granting inspection, where the mine of one owner is alleged to have been encroached upon by an adjoining owner, is that wherever it happens that a person has the power of

(*p*) See *Darley Main Colliery Co. v. Mitchell*, *supra*, which supports this view, and the case cited in the next note.

(*q*) *West Leigh Colliery Co., Limited v. Tunncliffe and Hampson, Limited*, [1908] A. C. 22.

making use of his land to the injury of another and there is *prima facie* evidence of his doing it, even though contradicted and the real fact can only be ascertained by going upon that land for the purpose of inspecting it, and that inspection can be done without producing injury to the person whose land it is, an inspection will be directed (*r*).

Orders for Inspection.—The order for inspection comprises, in general, all incidental directions for rendering the inspection effective ; and in a proper case, the order will also direct the removal of obstructions (*s*).

An order for inspection in the case of mines is almost always made upon terms ; and the terms usually imposed are, that a reasonable notice in writing shall be given, stating the time at which the applicant proposes that the inspection shall take place, and giving the names and descriptions of the persons whom he proposes as his agents for that purpose, which agents must not be persons to whom the opposite party may reasonably object ; and the opposite party and his agents will usually be allowed to attend the inspection ; and if any obstructions require to be removed, the applicant is to be at liberty to remove the

(*r*) *Bennett v. Whitehouse* (1860), 29 L. J. Ch. 326, in which it was said that “ the court only requires a *prima facie* case to enable it to make the order. . . . Suppose a man has a right to the surface of the ground, but no right to the minerals, and the person who has the right to the minerals says to the surface owner, ‘ You are sinking a shaft and getting the minerals which belong to me, and with which you have nothing to do, and you will not allow me to go upon your land to see whether that is done,’—would not the court, in such a case, allow him to go on the land to see whether the surface owner is sinking a shaft for that purpose ? ” See also *Earl of Lonsdale v. Curwen* (1799), 3 Bligh (o.s.) 168 ; *Walker v. Fletcher* (1804), 3 Bligh (o.s.) 177 ; *Ennor v. Barwell* (1860), 6 Jur. (n.s.) 1233 ; *Lewis v. Marsh* (1849), 8 Hare, 97 ; *Att.-Gen. v. Chambers* (1854), 12 Beav. 159 ; *Whaley v. Braucker* (1864), 10 Jur. (n.s.) 535 ; *Bennett v. Griffiths* (1861), 30 L. J. Q. B. 98 ; *Cooper v. Inch Hall Co.*, W. N. (1876) 24 ; *Mitchell v. Darley Main Colliery Co.* (1883), 10 Q. B. D. 457.

(*s*) *Bennett v. Griffiths* (1861), 30 L. J. Q. B. 98. See also *Lumb v. Beaumont* (1884), 27 Ch. D. 356.

same, but at his own expense ; and he must not do unnecessary damage, and must make good all the damage he may do.

The following is an example of an order made on an interlocutory application in a case (*t*) where the defendants had undermined the plaintiff's house so that it fell : "It is ordered that the plaintiff's solicitors or agents be at liberty to take a copy of that portion of the colliery plan which shows the working of the defendants' mine under the plaintiff's house, premises, and lands, and within a reasonable distance thereof ; and further, that the plaintiff, his solicitors, and two viewers or colliery agents may forthwith, upon giving one day's notice to the defendants' solicitor or agent, inspect the working of the defendants' coal mines underlying the plaintiff's house, premises, and lands, and within a reasonable distance thereof, the plaintiff, his solicitor, and the said viewers or agents to be allowed the use of the defendants' shaft and cages for ascent and descent, and to be accompanied and guided by a person appointed by the defendants. The defendants to offer all reasonable facilities for access, but should there be any necessity for interfering with the ventilation, air-courses or ways, the defendants not to be obliged to interfere therewith unless ordered. Should there be any difficulty in carrying out this order, or as to the reasonableness of the distance, either party may apply further ; the costs of and occasioned by this application to be costs in the cause."

Costs of Inspection.—The costs relative to the order and inspection are in the discretion of the judge (*u*), who may order the costs to be borne by the applicant in any event (*x*).

(*t*) *Bell v. Lowe* (1883), 10 Q. B. D. 547.

(*u*) *Mitchell v. Darley Main Colliery Co.* (1883), 10 Q. B. D. 457.

(*x*) *Ibid.*

CHAPTER VI.

PARTY WALLS.

SECT.	PAGE
1.— <i>Party Walls and Party Fences outside the Area of the London or Metropolitan Building Acts</i>	127
2.— <i>Party Walls within the Area of the London or Metropolitan Building Acts</i>	133

SECTION 1.—PARTY WALLS AND PARTY FENCES OUTSIDE
THE AREA OF THE LONDON OR METROPOLITAN
BUILDING ACTS.

Definition of the Term “Party Wall.”—The term “party wall” may be used in any one of four different senses. It may be applied to a wall of which the two adjoining owners are tenants in common (*a*), and this perhaps is the primary meaning of the term; it may be applied to a wall divided longitudinally into two strips, one belonging to each of the two adjoining owners (*b*); it may be applied to a wall which belongs entirely to one of the adjoining owners, subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements; and it may be applied to a wall divided longitudinally into two moieties, each moiety being subject to an easement in favour of the other moiety (*c*).

Ownership of a Wall erected at Joint Expense.—The ownership of a party wall erected at the joint expense of

(*a*) *Wiltshire v. Sidford* (1827), 1 M. & R. 403; *Cubitt v. Porter* (1828), 8 B. & C. 257. See *per* FRY, J., in *Watson v. Gray*, *infra*.

(*b*) *Matts v. Hawkins* (1813), 5 Taunt. 20. See *per* FRY, J., in *Watson v. Gray*, *infra*, at p. 195.

(*c*) *Watson v. Gray* (1880), 14 Ch. D. 192.

the two proprietors, as a general rule, depends on and follows the ownership of the land on which it stands, where the quantity of the land contributed by each proprietor is known. There is no transfer of the property of either proprietor to the other in such a case as this, but both proprietors continue to be the several owners of their respective lands as before, each having the ordinary remedy for an injury done to the portion of the wall standing on his own soil (*d*). Where, however, the circumstances under which the wall was built are unknown, so that it cannot be shown upon whose land the wall stands, it must be presumed, apparently, that the wall belongs to the two proprietors as tenants in common (*e*).

Removal of Part of a Party Wall by a Several Owner.—Where the wall is not owned in common, but one-half of it belongs exclusively to one proprietor and the other half of it exclusively to the other, either proprietor is justified, it seems, in pulling down so much of the wall as stands on his own land, although the result be to impair the stability of the other portion standing on the neighbour's land (*f*). In a case of this kind, however, the owner pulling down his portion of the wall must exercise due diligence not to cause unnecessary damage to his neighbour's property (*g*). The mere circumstance that two walls are in juxtaposition will not of itself give the right of support, or render it necessary that a person pulling down his part of the wall should give notice of

(*d*) *Matts v. Hawkins* (1813), 5 Taunt. 20. See also *Waddington v. Naylor* (1889), 60 L. T. 480.

(*e*) *Standard Bank of British South America v. Stokes* (1878), 9 Ch. D. 68, at p. 71 (JESSEL, M.R.); *Wiltshire v. Sidford* (1827), 1 M. & R. 403; 8 B. & C. 259; *Hutchinson v. Mains* (1832), 41 & Nap. 155. See also Callis on Sewers, p. 74 (cited in *Duke of Newcastle v. Clark*, 8 Taunt. 627, 628).

(*f*) *Wigford v. Gill*, Cro. Eliz. 269; *Wiltshire v. Sidford* (1827), 1 M. & R. 403; *Kempston v. Butler* (1861), 12 Ir. C. L. R. 516.

(*g*) *Bower v. Peake* (1876), 1 Q. B. D. 321; *Dalton v. Angus* (1881), 6 App. Cas. 740.

his intention so to do to the owner of the other part of the wall (*h*).

Easement of Support preventing a Several Owner from interfering with his own Wall.—The rights of a several owner of part of a wall standing on his own land may be, and indeed, in the majority of cases is, controlled by an easement of support in favour of his neighbour's building (*i*). In such a case the former cannot rightfully deal with his own moiety of the wall so as to deprive his neighbour's building of the support afforded by his own portion of the wall (*k*).

Where a man grants a divided moiety of an outside wall of his own house, with the intention of making that wall a party wall between his house and an adjoining house to be built by the grantee, the law implies the grant and reservation in favour of the grantor and the grantee respectively of such easements as may be necessary to carry out the common intention of the parties with regard to the user of the wall. Thus, if it is within the contemplation of the parties that the grantee shall support the roof of the house which he intends to build upon that moiety of the wall which is comprised in the grant, the other moiety of the wall will be subject to an easement of lateral support for the benefit of the roof when erected; and similarly the grantee's moiety of the wall will pass to him subject to the easement of lateral support for the

(*h*) *Trower v. Chadwick*, 6 Bing. N. C. 1; 8 Scott, 1.

(*i*) As to the law of support generally, see pp. 69 *et seq.*, *ante*. As to the easement of support for a building from an adjoining building, see pp. 78 *et seq.*, *ante*. See also *Richards v. Rose* (1853), 9 Ex. 218; *Brown v. Windsor* (1830), 1 C. & J. 20; *Peyton v. London Corporation* (1829), 9 B. & C. 736; *Massey v. Goyder* (1829), 4 C. & P. 161; *Murchie v. Black* (1865), 19 C. B. (N.S.) 190; *Lemaitre v. Davis* (1881), 19 Ch. D. 281; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Colebeck v. Girdlers Co.* (1876), 1 Q. B. D. 234.

(*k*) See the cases cited in the last note.

benefit of the grantee of the grantor's roof if supported by his half of the wall (*l*).

Liability for Negligence in Removal of a Wall.—

Even where no right of support exists an owner pulling down his own wall or his part of a wall may be held to have acted so negligently as to render himself liable for damages occasioned to his neighbour (*m*). He may be held liable although the property injured may have been so infirm that it could have lasted only a few months longer; for no person has a right to accelerate the fall of his neighbour's house—the age and condition of the property injured being merely a circumstance to be taken into consideration by the jury in determining the amount of the negligence and in assessing the proper damages (*n*).

Thus, the defendants were held liable for carelessness in underpinning a party wall between their property and the plaintiff's, whereby injury occurred to the latter, the court holding that it made no difference, where the defendants conducted themselves so carelessly, negligently, and improperly in pulling down their house, and in omitting to use proper precautions in that behalf, whereby large quantities of bricks, mortar, etc. fell from the defendants' house into and upon the plaintiff's house, and broke his windows, skylights, etc. and occasioned other consequential damage, whether the plaintiff was owner in severalty of the half of the wall which was next his house, or whether he and the defendants were tenants in common of the whole wall (*o*).

Contribution towards Repair of a Party Wall Owned in Common.—Tenancy in common of a party wall or

(*l*) *Jones v. Pritchard*, [1908] 1 Ch. 630, at pp. 635, 636.

(*m*) *Walters v. Pfeil* (1829), M. & M. 364.

(*n*) *Dodd v. Holme* (1834), 1 A. & E. 493; 3 N. & M. 739.

(*o*) *Bradbee v. Christ's Hospital* (1843), 4 M. & Gr. 761. See also *Gayford v. Nicholls* (1854), 9 Ex. 708; *Davis v. Blackwall Rail. Co.* (1840), 1 M. & Gr. 799; *Jones v. Bird* (1822), 5 B. & Ald. 837.

fence, it has been sometimes said, does not imply any obligation on the part of one tenant in common towards his co-tenant to repair (*p*) ; but this statement must be doubted—except as regards ordinary repairs (*q*) ; and it is most probably erroneous, as regards necessary repairs ; for, at common law, where one tenant in common of a party wall refused to contribute his share to the repairs, he might have been compelled to fulfil his duty by the writ *de reparatione faciendâ* ; and although that writ was abolished by the statute abolishing real actions (*r*), still the abolition is only of the writ, and not of the action grounded on the writ (*s*).

Remedies of Trespass and Ejectment in respect of Party Walls.—If two persons are owners in severalty of the two moieties of a party wall, either may maintain trespass against the other for an injury done to his half of the wall (*t*). Either may bring ejectment in case he is ousted of his half of the wall (*u*).

Trespass will not, however, lie in favour of one tenant in common against another, unless there has been some destruction of the common property, and ejectment will not lie, unless an actual ouster of the plaintiff from the common property by the defendant be proved (*x*). Thus, trespass will lie for pulling down a wall or destroying a tree, carrying away boundary stones, grubbing up a

(*p*) Gibbon on Dilapidations, p. 264.

(*q*) *Leigh v. Dickeson* (1883), 12 Q. B. D. 194 ; (1884), 15 Q. B. D. 60.

(*r*) 3 & 4 Will. 4, c. 27, s. 36.

(*s*) Co. Litt. 200 b ; F. N. B. 127. See *Leigh v. Dickeson* (1884), 15 Q. B. D. 60, at pp. 65, 67, 68.

(*t*) *Matts v. Hawkins* (1813), 5 Taunt. 20.

(*u*) *Trotter v. Simpson*, 5 C. & P. 51 ; *Murly v. M'Dermott* (1838), 8 A. & E. 138.

(*x*) *Stedman v. Smith* (1857), 8 E. & B. 1 ; *Jacobs v. Seward* (1869), L. R. 4 C. P. 328 ; 5 H. L. 464 ; *Watson v. Gray* (1880), 14 Ch. D. 192.

hedge, and the like injuries to the common property (*y*); but not for pulling down a wall with intent to rebuild it, though an action for waste might under such circumstances lie (*z*), as it will in any other case where one tenant in common misuses the common property (*a*). Again, no action can be maintained by one tenant in common against another for merely clipping a hedge, or cutting trees in it of a proper age and growth—because that would have the effect of enabling one tenant to prevent another from taking the fair profits of the estate (*b*).

Increase in Height of a Party Wall Owned in Common.—Moreover, if one of two tenants in common of a wall heightens it to a greater extent than is proper, it has been said that the only remedy of the other is to remove the addition (*c*).

Thus, where the plaintiff and the defendant were respectively owners of adjoining houses, and at the rear of each of the houses there was a yard, and the two yards were separated by a wall, and it appeared that the plaintiff, in the course of erecting a shed in his back yard adjoining to the separation wall, built on the top of that wall without the defendant's permission a new piece of wall of a triangular shape, and the defendant knocked down this new piece of wall, the court was of opinion that the defendant was justified in what he had done (*d*).

Partition of a Party Wall Owned in Common.—Where two persons are tenants in common of a party

(*y*) *Cubitt v. Porter* (1828), 8 B. & C. 270 ; *Noye v. Reed* (1827), 1 M. & R. 63 ; *Murray v. Hall* (1849), 7 C. B. 441 ; *Waterman v. Soper* (1697), 1 Ld. Raym. 737 ; *Voyce v. Voyce* (1820), Gow. 201 ; Co. Litt. 200 b.

(*z*) *Cubitt v. Porter* (1828), 8 B. & C. 270.

(*a*) Co. Litt. 200 b.

(*b*) *Martyn v. Knollys* (1799), 8 T. R. 145 ; *Jacobs v. Seward* (1869), L. R. 4 C. P. 328 ; 5 H. L. 464.

(*c*) *Cubitt v. Porter* (1828), 8 B. & C. 270.

(*d*) *Watson v. Gray* (1880), 14 Ch. D. 192.

wall, either of them may enforce a partition of the wall as of right, and the partition may be ordered to be made longitudinally (*e*). The difficulty of making a partition, or the inconvenience resulting from it when made, is no ground for depriving a tenant in common of his legal right to a partition (*f*).

Statute of Limitations.—Where a man erects a house in such a way that his neighbour's wall is utilised to form one side of the new house, he will not acquire a right to wall under the Statute of Limitations (*g*).

No question of the acquisition of a title under the provisions of the Statute of Limitations can arise where a visible inscription, to the effect that a wall belongs to an adjoining owner, has been allowed to remain upon the wall (*h*).

SECTION 2.—PARTY WALLS WITHIN THE AREA OF THE LONDON OR METROPOLITAN BUILDING ACTS.

The London Building Act, 1894.—The London Building Act, 1894 (*i*), which regulates the erection of buildings within the London area (*k*), contains divers provisions with regard to party walls. This Act is, in the main, a consolidating Act which repealed and re-enacted the provisions with regard to buildings in London which were theretofore contained in some thirteen public and local

(*e*) *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508.

(*f*) *Parker v. Gerard*, Amb. 236; *Warner v. Baines*, Amb. 589; *Turner v. Morgan* (1803), 8 Ves. 142; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508, at p. 514.

(*g*) *Phillipson v. Gibbon* (1871), L. R. 6 Ch. App. 428. See also *Waddington v. Naylor* (1889), 60 L. T. 480; *Murly v. McDermott* (1838), 8 A. & E. 138.

(*h*) *Phillipson v. Gibbon*, *supra*.

(*i*) 57 & 58 Vict. c. ccxiii.

(*k*) *I.e.*, the Administrative County of London and the City of London. The City of London includes all parts then within the jurisdiction of the Commissioners of Sewers of the City of London.

Acts of Parliament (*l*). The great bulk of the provisions of the London Building Act, 1894, in so far as they concern party walls, were comprised in the Metropolitan Building Act, 1855 (*m*), and many of the judicial decisions on the construction of the latter Act, are referred to throughout the following pages of this Chapter, as applicable to similar provisions in the London Building Act, 1894.

Definitions of Walls contained in the Act.—The London Building Act, 1894 (which for brevity's sake we shall call in future "the Act"), contains definitions of the several descriptions of walls which are referred to throughout the Act.

An *external wall* is defined as any outer wall or vertical inclosure of any building not being a party wall (*n*).

A *party wall* is defined as being either a wall forming part of a building and used or constructed to be used for separation of adjoining buildings belonging to different owners, or occupied or constructed or adapted to be occupied by different persons; or a wall forming part of a building and standing to a greater extent than the projection of the footings on lands of different owners (*o*).

(*l*) See the preamble of the Act.

(*m*) 18 & 19 Vict. c. 122.

(*n*) 57 & 58 Vict. c. cxxiii., s. 5 (15). See *Att.-Gen. v. Greig*, [1908] 1 Ch. 327; *Frederick Betts, Limited v. Pickfords, Limited*, [1906] 2 Ch. 87.

(*o*) 57 & 58 Vict. c. cxxiii., s. 5 (16). See *Frederick Betts, Limited v. Pickfords, Limited*, [1906] 2 Ch. 87; *London, Gloucestershire and North Hants Dairy Co. v. Morley*, [1911] 2 K. B. 257.

In *Knight v. Pursell* (1879), 11 Ch. D. 412, which was an action in which the plaintiff sought an injunction restraining the defendant from pulling down a wall which stood wholly on the plaintiff's premises, and which was a *party structure* between the plaintiff's and defendant's premises—the plaintiff having on one side of the wall some sheds and closets, and the defendant having on the other side of the wall a larger roofed-in building resting against the wall and running along part of it,—the injunction granted was limited to the part of the wall which ran between the buildings. In this case the court followed the distinction taken in *Weston v.*

A *cross-wall* is defined as meaning a wall used or constructed to be used in any part of its height as an inner wall of a building for separation of one part from another part of the building, that building being wholly

Arnold (1873), L. R. 8 Ch. App. 1084. FRY, J., observed that it appeared to him "on reading the definition of a party wall contained in the third section of the Act (18 & 19 Vict. c. 122), that the intention is to define a party wall, not by reference to the rights of ownership which the adjoining proprietors may have in any particular wall in dispute, but by reference to the mode of user of the wall; that is to say, it is a question not of title, but of user; and therefore in order to determine whether this wall is a party wall, it is not necessary to consider what rights of ownership the plaintiff and defendant have, but what is the physical condition, position, and user of the wall."

In *Weston v. Arnold* (1873), L. R. 8 Ch. App. 1082, which was a case depending on the construction of the Bristol Building Act (an Act which for our present purposes may be regarded as similar in all material respects to the London Building Act, 1894), it appeared that the plaintiff's house overlooked, on the south, a courtyard and outbuildings belonging to the defendants, built up against the plaintiff's house—so that, to the height of the first storey, the wall of plaintiff's house was a party wall between the two buildings. The plaintiff's house, however, had two storeys above the first storey; and in the south wall had twelve windows—all opening on the external air above defendant's outbuildings. The action was for an injunction restraining the defendant from building so as to obstruct the plaintiff's twelve windows in his south wall. JAMES, L.J., in giving judgment for the plaintiff, observed that "a party wall is a thing which belongs to two persons as part owners, or which divides two buildings one from another. It is beyond even the power of the legislature to make that a party wall which is not a party wall; they might no doubt make provisions to the effect that that which is not a party wall shall, for the purposes of a particular Act of Parliament, be deemed to be a party wall; but they cannot make what is not a party wall a party wall, any more than they can make a square a circle. . . . A wall may in part of its length be a party wall, and in part of its length an external wall; and there is no distinction between height and length—that is to say, a wall may be a party wall up to part of its height, and may be an external wall for the rest of its height. Property in London is intermixed in such a way that one man's basement and cellar often extend under another man's shop; and the first floor of one house is often over the shop of the next house; and in such case, there would be a party wall between the two buildings below, which above would only be a private partition between two rooms in the same house. There is nothing in fact or law to make it impossible or improbable that a wall should be a

in, or being constructed or adapted to be wholly in, one occupation (*p*).

A *party-fence wall* is defined as meaning a wall used or constructed to be used as a separation of adjoining lands of different owners, and standing on lands of different owners, and not being part of a building, but so as not to include a wall constructed on the land of one owner, the footings of which project into the land of another owner (*q*).

A *party-arch* is defined as meaning an arch separating adjoining buildings, storeys, or rooms belonging to different owners, or occupied or constructed or adapted to be occupied by different persons, or separating a building from a public way or a private way leading to premises in other occupation (*r*).

A *party-structure* is defined as meaning a party wall and also a partition floor or other structure separating vertically or horizontally buildings, storeys, or rooms approached by distinct staircases or separate entrances from without (*s*).

The expression *building owner* is defined as meaning such one of the owners of adjoining land as is desirous of building, or such one of the owners of buildings, storeys, or rooms separated from one another by a party

party wall up to a certain height, and above that height be the separate property of one of the owners."

The principle of this decision has been recognised and followed in *Drury v. Army and Navy Supply, Limited*, [1896] 2 Q. B. 271, a case arising on ss. 59 and 75 of the London Building Act, 1894 (57 & 58 Vict. c. cccxiii.), which contains certain provisions relative to the thickness of party walls and to the height thereof above the flat of the roof or gables, and relative to the dividing walls (sometimes called party walls) in buildings of the warehouse class. It was held, in the last mentioned case, that a party wall ceased to be such and became (in effect) an external wall, when it ceased to be a dividing wall. See also *Crofts v. Haldane* (1867), L. R. 2 Q. B. 194; *Corbett v. Hill* (1870), L. R. 9 Eq. 671; *Laybourn v. Gridley*, [1892] 2 Ch. 53; *Watson v. Gray* (1880), 14 Ch. D. 192.

(*p*) 57 & 58 Vict. c. cccxiii., s. 5 (17).

(*q*) *Ibid.*, s. 5 (18).

(*r*) *Ibid.*, s. 5 (19).

(*s*) *Ibid.*, s. 5 (20).

wall or party structure as does or is desirous of doing a work affecting that party wall or party structure (*t*).

An *adjoining owner* is defined as meaning the owner of the land or (as the case may be) of the buildings adjoining those of the building owner (*u*).

The Act provides that as regards party walls, in either of the following cases, that is to say, first, when a wall was after December 31st, 1894, built as a party wall in any part; or secondly, where a wall built before or after that date becomes, after the commencement of the Act, a party wall in any part,—the wall shall be deemed a party wall for such part of its length as is so used (*x*).

Provisions Regulating the Building of Party Walls in London.—The Act contains the following provisions with regard to the building of party walls in London (*y*):

“Where lands of different owners adjoin and are unbuilt on at the line of junction and either owner is about to build on any part of the line of junction the following provisions shall have effect:

“(1) If the building owner desire to build a party wall on the line of junction he may serve notice thereof on the adjoining owner describing the intended wall.

“(2) If the adjoining owner consent to the building of a party wall the wall shall be built half on the land of each of the two owners or in such other position as may be agreed between the two owners.

“(3) The expense of the building of the party wall shall be from time to time defrayed by the two

(*t*) 57 & 58 Vict. c. cxxiii., s. 5 (31). See also *Lewis and Solome v. Charing Cross, Euston and Hampstead Rail. Co.*, [1906] 1 Ch. 508.

(*u*) 57 & 58 Vict. c. cxxiii., s. 5 (32). See also *List v. Sharp*, [1897] 1 Ch. 260; *Crosby v. Alhambra Co., Limited* [1907] 1 Ch. 295.

(*x*) 57 & 58 Vict. c. cxxiii., s. 58; *London, Gloucestershire and North Hants Dairy Co. v. Morley*, [1911] 2 K. B. 257.

(*y*) 57 & 58 Vict. c. cxxiii., s. 87.

owners in due proportion regard being had to the use made and which may be made of the wall by the two owners respectively.

- “(4) If the adjoining owner do not consent to the building of a party wall the building owner shall not build the wall otherwise than as an external wall placed wholly on his own land.
- “(5) If the building owner do not desire to build a party wall on the line of junction but desires to build an external wall placed wholly on his own land he may serve notice thereof on the adjoining owner describing the intended wall.
- “(6) Where in either of the cases aforesaid the building owner proceeds to build an external wall on his own land, he shall have a right at his own expense, at any time after the expiration of one month from the service of the notice to place on the land of the adjoining owner below the level of the lowest floor the projecting footings of the external wall with concrete or other solid sub-structure thereunder making compensation to the adjoining owner or occupier for any damage occasioned thereby the amount of such compensation if any difference arise to be determined in the manner in which differences between building owners and adjoining owners are ” elsewhere in the Act directed to be determined.
- “Where an external wall is built against another external wall or against a party wall, it shall be lawful for the district surveyor to allow the footing of the side next such other external or party wall to be omitted ” (z).

Rights of a Building Owner in London with regard to Party Structures.—The Act provides that a building

(z) *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508.

owner shall have the following rights in relation to party structures (a), that is to say—

“(1) A right to make good underpin or repair any party structure which is defective or out of repair (b).

“(2) A right to pull down and rebuild any party structure which is so far defective or out of repair as to make it necessary or desirable to pull it down (c).

“(3) A right to pull down any timber or other partition which divides any buildings and is not conformable with the regulations of this Act, and to build instead a party wall conformable thereto.

“(4) In the case of buildings having rooms or storeys the property of different owners intermixed a right to pull down such of the said rooms or storeys or any part thereof as are not built in conformity with this Act and to rebuild the same in conformity with this Act.

“(5) In the case of buildings connected by arches or communications over public ways or over passages belonging to other persons a right to pull down such of the said buildings arches or communications or such parts thereof as are not built in conformity with this Act and to rebuild the same in conformity with this Act.

“(6) A right to raise and underpin any party structure permitted by this Act to be raised or underpinned or any external wall built against such party structure upon condition of making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof and of carrying up to the requisite height all flues and chimney stacks belonging to the adjoining owner on or against such party structure or external wall (d).

(a) 57 & 58 Vict. c. ccxiii., s. 88, *corresponding* with 18 & 19 Vict. c. 122, s. 83. As to the meaning of the term “party structure,” see p. 136, *ante*.

(b) See *Minturn v. Barry*, [1911] 2 K. B. 265.

(c) *Debenham v. Metropolitan Board of Works* (1880), 6 Q. B. D. 112.

(d) *Adams v. Marylebone Borough Council*, [1907] 2 K. B. 822.

“(7) A right to pull down any party structure which is of sufficient strength for any building intended to be built, and to rebuild the same of sufficient strength for the above purpose upon condition of making good all damages occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof (*e*).

“(8) A right to cut into any party structure upon condition of making good all damage occasioned to the adjoining premises by such operation.

“(9) A right to cut away any footing or any chimney breasts jambs or flues projecting or other projections from any party wall or external walls in order to erect an external wall against such party wall or for any other purpose upon condition of making good all damage occasioned to the adjoining premises by such operation.

“(10) A right to cut away or take down such parts of any wall or building of an adjoining owner as may be necessary in consequence of such wall or building overhanging the ground of the building owner in order to erect an upright wall against the same on condition of making good any damage sustained by the wall or building by reason of such cutting away or taking down.

“(11) A right to perform any other necessary works incident to the connection of a party structure with the premises adjoining thereto” (*f*).

“But the above right shall be subject to this qualification that any building which has been erected previously to the date of the commencement of the Act shall be deemed to be conformable with the provisions of the Act if it be conformable with the provisions of the Acts of Parliament regulating buildings in London before the commencement of the Act.

“A right to raise a party-fence wall or to pull down the same and rebuild it as a party wall.”

(*e*) *Williams v. Golding* (1865), L. R. 1 C. P. 69.

(*f*) *Minturn v. Barry*, [1911] 2 K. B. 265.

Rights of Adjoining Owners in London with regard to Party Structures.—Where a building owner proposes to exercise any of the foregoing rights with respect to party structures, the Act allows the adjoining owner certain privileges. The material provisions of the Act in this respect are as follows :

“(1) Where a building owner proposes to exercise any of the foregoing rights with respect to party structures the adjoining owner may by notice require the building owner to build on any such party structure such chimneys copings jambs or breasts or flues or such piers or recesses or any other like works as may fairly be required for the convenience of such adjoining owner and as may be specified in the notice and it shall be the duty of the building owner to comply with such requisition in all cases where the execution of the required works will not be injurious to the building owner or cause to him unnecessary inconvenience or unnecessary delay in the exercise of his right.

“(2) Any difference that arises between a building owner and an adjoining owner in respect of the execution of any such works shall be determined in manner in which differences between building owners and adjoining owners are elsewhere in the Act directed to be determined” (*g*).

Obligation upon a Building Owner in London to Notify the Adjoining Owner of his Intention to Exercise his Rights in respect of Party Walls, etc.—The Act contains (*h*) divers provisions which impose upon a building owner the obligation of notifying the adjoining owner of his intention to exercise his rights in respect of

(*g*) 57 & 58 Vict. c. ccxiii., s. 89 ; *Leadbitter v. Marylebone Corporation*, [1904] 2 K. B. 893 ; *In re Stone and Hastie*, [1903] 2 K. B. 463.

(*h*) 57 & 58 Vict. c. ccxiii., s. 90. See also *Hobbs v. Groves*, [1899] 1 Ch. 11 ; *Major v. Park Lane Co.* (1866), L. R. 2 Eq. 453 ; *Leadbitter v. Marylebone Corporation*, *supra* ; *In re Stone and Hastie*, *supra* ; *Crosby v. Alhambra Co., Limited*, [1907] 1 Ch. 295.

party-fence walls, party walls, and party structures. The material provisions of the Act are as follows :

“(1) A building owner shall not except with the consent in writing of the adjoining owner and of the adjoining occupiers or in cases where any wall or party structure is dangerous (in which cases the provisions of Part IX. of the Act shall apply) exercise any of his rights under the Act, in respect of any party-fence wall unless at least one month or exercise any of his rights under the Act in relation to any party wall or party structure other than a party-fence wall unless at least two months before doing so he has served on the adjoining owner a party wall or party structure notice stating the nature and particulars of the proposed work and the time at which the work is proposed to be commenced.

“(2) When a building owner in the exercise of any of his rights under the Act lays open any part of the adjoining land or building he shall at his own expense make and maintain for a proper time a proper hoarding and shoreing or temporary construction for protection of the adjoining land or building and the security of the adjoining occupier.

“(3) A building owner shall not exercise any right by the Act given to him in such manner or at such time as to cause unnecessary inconvenience to the adjoining owner or to the adjoining occupier.

“(4) A party wall or structure notice shall not be available for the exercise of any right unless the work to which the notice relates is begun within six months after the service thereof and is prosecuted with due diligence (*i*).

“(5) Within one month after the receipt of such notice the adjoining owner may serve on the building owner a notice requiring him to build on any such party structure any works to the construction of which he is hereinbefore declared to be entitled.

(*i*) See *Leadbitter v. Marylebone Corporation*, [1905] 1 K. B. 661.

“(6) The last-mentioned notice shall specify the works required by the adjoining owner for his convenience and shall (if necessary) be accompanied by explanatory plans and drawings.

“(7) If either owner do not within fourteen days after the service on him of any notice express his consent thereto he shall be considered as having dissented therefrom and thereupon a difference shall be deemed to have arisen between the building owner and the adjoining owner” (k).

Underpinning of Walls in London.—The Act contains provisions empowering a building owner to underpin or otherwise strengthen the wall of a building belonging to an adjoining owner under certain circumstances (l). The material provisions of the Act in this respect are as follows:

“Where a building owner intends to erect within ten feet of a building belonging to an adjoining owner a building or structure any part of which within such ten feet extends to a lower level than the foundations of the building belonging to the adjoining owner he may and if required by the adjoining owner shall (subject as hereinafter provided) underpin or otherwise strengthen the foundations of the said building so far as may be necessary and the following provisions shall have effect:

“(1) At least two months’ notice in writing shall be given by the building owner to the adjoining owner stating his intention to build and whether he proposes to underpin or otherwise strengthen the foundations of the said building, and such notice shall be accompanied by a plan and sections showing the site of the proposed building and the depth to which he proposes to excavate.

(k) As to differences, see *Ex parte McBryde* (1876), 4 Ch. D. 200; *Standard Bank, etc. v. Stokes* (1878), 9 Ch. D. 68. See also *Leadbitter v. Marylebone Corporation*, [1905] 1 K. B. 661.

(l) 57 & 58 Vict. c. ccxiii., s. 93.

- “(2) If the adjoining owner shall within fourteen days after being served with such notice give a counter-notice in writing that he disputes the necessity of or require such underpinning or strengthening a difference shall be deemed to have arisen between the building owner and the adjoining owner.
- “(3) The building owner shall be liable to compensate the adjoining owner and occupier for any inconvenience loss or damage which may result to them by reason of the exercise of the powers conferred by this section.
- “(4) Nothing in this section contained shall relieve the building owner from any liability to which he would otherwise be subject in case of injury caused by his building operations to the adjoining owner” (*m*).

Remedies of Building and Adjoining Owners in London.—The provisions of the Act relative to the avoidance of unnecessary damage and to the repairing of the actual damage done are specific, and in general supply a party injured with a complete remedy and protection. But these specific provisions are really only an expression for the most part of what the law would ordain apart from them; for, by the common law a man, who orders to be executed on his own premises work lawful in itself but from which injurious consequences must in the natural course of things be expected unless means are adopted for their prevention, is bound to see to the doing of all that is necessary for their prevention; and cannot relieve himself of his responsibility by employing a contractor for the purpose.

Where the plaintiff and defendant were respectively owners of two adjoining houses, the plaintiff being entitled

(*m*) *Bower v. Peate* (1876), 1 Q. B. D. 321; *Dalton v. Angus* (1881), 6 App. Cas. 740.

to support, for his house, of defendant's soil, and the defendant employed, for the purpose of pulling down his house, excavating the foundations and rebuilding the house, a contractor who undertook the risk of supporting the plaintiff's house, as far as might be necessary, during the work, and to make good any damage, and to satisfy any claims arising therefrom, and the plaintiff's house was injured in the progress of the work, owing to the insufficient means taken by the contractor to support it, the defendant was held liable (n).

Again, where it appeared that plaintiff and defendant were owners of adjoining houses, between which was a party wall the property of both, and that the latter's house also adjoined a third party's house and between them was a party wall, and the defendant employed a builder to pull down his house and rebuild it on a plan which involved the tying together of the new house and the party wall between it and the plaintiff's house so that if one fell the other would be damaged, and in the course of the rebuilding the builder's workmen in fixing a staircase negligently and without the knowledge of the defendant cut into the party wall between his house and that of the third party, in consequence whereof the defendant's house fell and the fall dragged over the party wall between it and the plaintiff's house, which was thereby injured,—the cutting into the party wall not having been authorised by the contract between the defendant and his builder, it was held, that the defendant could not get rid of the duty cast upon him by the law to see that reasonable care and skill were exercised in those operations, by delegating the performance of the work to a third person (o).

Again, in an action for damage occasioned to the plaintiff's house by the defendant, as contractor for the building owner, through insufficient underpinning of the party

(n) *Bower v. Peate* (1876), 1 Q. B. D. 321. See also *Dalton v. Angus* (1881), 6 App. Cas. 740.

(o) *Hughes v. Percival* (1883), 8 App. Cas. 443.

wall, it was stated that the right which the building owner was exercising was a right to cut into any party structure, upon condition of making good all damage occasioned to the adjoining premises by such operation, given to him by the Metropolitan Building Act, 1855 (*p*); and the defendant, being lawfully employed by the building owner, had a right, under the statute, to undermine the plaintiff's wall, on the condition of making good all damage occasioned thereto by such operation; and if he failed to make good such damage, he did not perform the condition on which his right to do the act depended; in other words, having done that which was an actionable wrong at common law, and having broken the condition upon which the statute made the act justifiable, he was liable for the damage, there being nothing in the statute which, in such case, took away the common law right (*q*).

Compliance with Building Acts.—A building owner, to obtain the benefit of the provisions contained in the Acts, must duly comply with those provisions,—even in matters of an apparently incidental and subordinate character.

Thus, in an action to restrain the defendant from underpinning a certain party structure before the prescribed directions of the surveyors had been obtained, it was said that the right of a building owner with respect to underpinning a party structure was a right merely to do that which the surveyors might direct should be done, and that the building owner had no right to do anything at all until he had obtained such directions (*r*).

The Act, however, should be read in a reasonable manner, thus, a building owner having, under the Act, a right to pull down a party structure, has also, of course, the right to underpin it, when that will be sufficient (*s*)—upon the principle *omne majus continet in se minus*.

(*p*) 18 & 19 Vict. c. 122, s. 83.

(*q*) *Williams v. Golding* (1865), L. R. 1 C. P. 69.

(*r*) *Standard Bank v. Stokes* (1878), 9 Ch. D. 68.

(*s*) *Standard Bank v. Stokes*, *supra*.

The notice prescribed by the Act, of the building owner's intention to remove a building adjoining the premises of another owner, appears, however, not to be required in every case of the mere removal of a building, but to be required only, *e.g.*, when the removal will disturb any party structure between the two buildings (*t*) ; or when, *e.g.*, the building intended to be removed is so constructed that its supports form part of the party structure—in which latter case, the building owner must undoubtedly give the prescribed notice of intention, although in the proposed re-erection he may not intend to make any further use of the party structure (*u*).

Contribution towards the Expense of Raising the Height of a Party Wall in London.—A building owner who has for his own benefit added to the height of a party wall, should at any rate in the first instance bear the whole of the expense, and an adjoining owner who afterwards makes use of the increased height of the wall should contribute to the expense under s. 95 of the Act. The Act, however, does not contain any provision for transferring to a tenant who has not contributed to the initial expense, the whole or any part of his lessor's right of contribution, and such a claim by the tenant ought not to be entertained by arbitrators acting under s. 91 of the Act (*x*).

Where an adjoining owner is liable to contribute to the expense of raising a party wall if he uses it, then on his using it, the person to whom the contribution is payable will be the building owner or his assigns, including the purchaser or sub-purchaser who is in possession of the house at the time when the adjoining owner makes use of the party wall (*y*).

(*t*) *Major v. Park Lane Co.* (1866), L. R. 2 Eq. 453.

(*u*) *Major v. Park Lane Co.*, *supra*.

(*c*) *In re An Arbitration between Stone and Hastie*, 19 T. L. R. 654.

(*y*) *Mason v. Fulham Corporation*, [1910] 1 K. B. 631.

CHAPTER VII.

PRESERVATION OF BOUNDARIES AND FENCES
BY TENANTS.

SECT.	PAGE
1.— <i>Preservation of the Distinguishing Boundaries of the Tenement</i>	148
2.— <i>Repair of the Fences of the Tenement</i>	149
3.— <i>Remedies in Default of Repair of Fences</i>	152

SECTION 1.—PRESERVATION OF THE DISTINGUISHING
BOUNDARIES OF THE TENEMENT.

Distinguishing Boundaries of the Tenement.—There is an obligation upon a tenant, arising out of the relationship created by the demise, to preserve the boundaries of his tenement (*a*). This obligation requires him to keep his own property distinct from that of his lessor. It requires him throughout his tenancy to preserve the boundaries in such a manner that the distinction may be shown at all times during his tenancy ; and not only at the time when his tenancy expires (*b*).

Tenant Intermixing his Tenement with Land of his Own.—If a tenant for life, or for years or at will, who has lands of his own adjoining the land of which he is tenant, neglects the duty above mentioned, and suffers the boundaries to become confused so that the reversioner or remainderman cannot tell to what land he is entitled,

(*a*) *Att.-Gen. v. Fullerton* (1813), 2 Ves. & B. 263, at p. 265 ; *Spike v. Harding* (1878), 7 Ch. D. 871 ; *Aston v. Exeter* (Lord) (1801), 6 Ves. jun. 289, at p. 293 ; *Att.-Gen. v. Stephens* (1855), 6 De G. M. & G. 111, at pp. 133, 134. See also *Searle v. Cooke* (1890), 43 Ch. D. 519.

(*b*) *Spike v. Harding*, *supra*, at p. 874.

the court will compel the person who has occasioned the difficulty to make good, out of what may be considered to be in the nature of a common fund, that portion of it that belongs to another (*c*). This relief is given not only against the party guilty of neglect, but also against all those who claim under him, either as volunteers or as purchasers with notice (*d*).

Ascertainment of Boundaries Confused by Tenants.—

From early times the courts of equity exercised jurisdiction in the ascertainment of boundaries by means of commissioners (*e*). It does not seem that this jurisdiction has in any way been impaired ; but a more convenient remedy would appear to be furnished by an inquiry directed by the court (*f*).

SECTION 2.—REPAIR OF THE FENCES OF THE TENEMENT.

Tenant's Obligation to Repair Fences.—As a general rule, the occupying tenant is liable for injuries caused by reason of the defective condition of the fences of the tenement (*g*).

“It is so notoriously the duty,” said Lord KENYON (*h*), “of the actual occupier to repair the fences, and so little the duty of the landlord, that, without any agreement to that effect, the landlord may maintain an action against

(*c*) *Att.-Gen. v. Stephens*, *supra*, at p. 134 ; *Att.-Gen. v. Fullerton*, *supra*, at pp. 264, 265.

(*d*) *Att.-Gen. v. Stephens*, *supra*, at p. 134 ; *Att.-Gen. v. Fullerton*, *supra*, at pp. 264, 265.

(*e*) See *Spyer v. Spyer* (1631), Nels. 14 ; *Darlington v. Bowes* (1759), 1 Eden, 270 ; *Leeds (Duke) v. Stratford (Earl)* (1798), 4 Ves. jun. 180.

(*f*) See *Spike v. Harding* (1878), 7 Ch. D. 871 ; *Searle v. Cooke* (1890), 43 Ch. D. 519. See also p. 262, *post*.

(*g*) *Cheetham v. Hampson* (1791), 4 T. R. 318. See also *Russell v. Shenton* (1842), 3 Q. B. 449 ; *Nelson v. Liverpool Brewery Co.* (1877), 2 C. P. D. 311.

(*h*) *Cheetham v. Hampson*, *supra*, at pp. 319, 320.

his tenant for not so doing, upon the ground of the injury done to the inheritance: and deplorable indeed would be the situation of landlords if they were liable to be harassed with actions for the culpable neglect of their tenants."

If, therefore, an action be brought against the owner of land for injuries arising from the defective condition of the fences, such action will fail if the owner be not in possession (*i*). On this principle, a declaration charging the defendant simply as "owner and proprietor" was held bad, inasmuch as these words did not necessarily imply that the defendant was also the occupier of the premises (*k*).

Cases where the Landlord is Liable for Injuries sustained by reason of the defective state of Fences.—

There are two categories of cases in which the landlord will be held liable for injuries sustained by reason of the defective state of the fences. First, where the landlord has taken the burden of repairing the premises on himself. In this case if he neglects to observe this duty, and injury results to third parties, or to the tenant, he may be sued (*l*). In the second category of cases liability attaches to the landlord because the state of the fences amounts to a nuisance, and the landlord let the premises with this nuisance subsisting at the time of the demise (*m*).

Tenant's Right to Cut Wood to Repair Fences.—

The mere relationship of landlord and tenant is a sufficient consideration for the tenant's promise to manage his farm

(*i*) *Russell v. Shenton* (1842), 3 Q. B. 449; *Nelson v. Liverpool Brewery Co.* (1877), 2 C. P. D. 311.

(*k*) *Russell v. Shenton* (1842), 3 Q. B. 449. See also *Cheetham v. Hampson*, *supra*.

(*l*) *Payne v. Rogers*, 2 H. Bl. 348; *Todd v. Flight* (1860), 9 C. B. (N.S.) 377, 389.

(*m*) *R. v. Pedley* (1834), 1 A. & E. 822; *Rosewell v. Prior* (1702), 2 Salk. 460; *Todd v. Flight* (1860), 9 C. B. (N.S.) 377. See also *Cheetham v. Hampson*, *supra*, p. 320.

in a husbandlike manner (*n*); and one of the duties devolving upon him in consequence of this implied promise, in the absence of any express agreement to the contrary, is that he shall maintain the fences of the property demised to him (*o*). For this purpose he is entitled to reasonable estovers (*p*); and he may, in general, cut timber to keep the walls, pales, fences, hedges, and ditches in the same state of repair in which he found them (*q*); but it has been said he cannot make new fences or other erections without being liable for waste (*r*), and, at all events, if he makes a new fence or a new house, he will be obliged to keep it in repair (*s*).

If there is no proper wood on the premises for repairs, the tenant, it has been said, is not obliged to purchase other wood, but is discharged from his liabilities in this respect; however, where a declaration was against a tenant for not using the premises demised to him in a husbandlike manner, and for not repairing the fences, a plea that there was no proper wood which he had a right to cut for repairs, and that the plaintiff ought to have set out proper wood for the purpose, was held to be an insufficient defence (*t*).

A tenant may not cut down estovers on one estate and apply them in making repairs upon another (*u*); and if he sell the timber cut, and, with the produce thereof, pay the wages of workmen, or even if he exchange the wood for timber better suited for the repairs wanted, or better seasoned, he is liable to an action in the nature of waste (*x*). Again, the tenant may not cut down timber

(*n*) *Powley v. Walker* (1793), 5 T. R. 373.

(*o*) *Cheetham v. Hampson* (1791), 4 T. R. 318.

(*p*) Co. Litt. 53 b.

(*r*) Co. Litt. 53 b; *Dyer*, 332.

(*q*) Co. Litt. 53 b.

(*s*) Co. Litt. 53 a.

(*t*) *Whitfield v. Weedon* (1772), 2 Chitty, R. 685.

(*u*) *Lee v. Alston* (1789), 1 Bro. C. C. 196; 3 Bro. C. C. 37.

(*x*) *Lewis Bowle's Case* (1615), 11 Rep. 79 b; *Simmons v. Norton* (1831), 7 Bing. 640; *Att.-Gen. v. Stawell* (1793), 2 Anst. 601; *Whitfield v. Bewit* (1724), 2 P. Wms. 242; *Gower v. Eyre*, Cooper, C. C. 156.

for future repairs (*y*), or for repairs that are wanted through his own default, for to cut timber to repair waste, it has been said, is double waste (*z*) ; but, where in ejectment against a tenant for cutting down timber not immediately applied in remedying existing defects and in excess of the quantity required, the jury found that it was cut *bonâ fide* for the purpose of making necessary repairs, and was intended to have been so applied in due course, the court refused to disturb the verdict (*a*). It appears that a lessee who takes reasonable estovers for repairing hedges and fences, is not chargeable with waste, merely by reason of his having entered into an express covenant to repair at his own charge, or by reason of the lessor having covenanted to do the repairs himself (*b*).

SECTION 3.—REMEDIES IN DEFAULT OF REPAIR OF FENCES.

Remedy by Re-entry.—If the lease contains a provision for re-entry on non-performance of any covenant, and the tenant has covenanted to repair the fences, the landlord can recover possession by action or by re-entry.

By the Conveyancing Act, 1881 (*c*), however, it is provided that a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease (other than for the payment of rent) shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring

(*y*) *Georges v. Stanfield* (1597), Cro. Eliz. 593 ; Cruise's Dig. Estates for Life, ss. 19, 20.

(*z*) Co. Litt. 53 b.

(*a*) *East v. Harding* (1595), Cro. Eliz. 478.

(*b*) Comyn, Dig. Waste, D. 5 ; Comyn, Dig. Plead. 3, O. 14.

(*c*) 44 & 45 Vict. c. 41, s. 14.

the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach (*d*).

Remedy on the Covenant.—Where the instrument of demise is under seal and the tenant has undertaken the duty of repairing fences, the landlord may sue him for damages on his covenant if the tenant fail to observe it (*e*). Specific performance of such a covenant will not be ordered (*f*).

Other Consequences of the Tenant's Breach of Duty to Maintain Fences.—It has been held that a tenant who has been guilty of a breach of covenant to keep the fences, etc., in repair, for which the lessor has a right of re-entry, is not entitled to the specific performance of a covenant for renewal (*g*). It has also been held that even if there were no right of re-entry, yet a court of equity seeing a gross piece of waste, which would in all cases occasion a forfeiture of the place wasted, and a gross breach of covenant that could not be well indemnified by damages, would leave the tenant to his remedy at law, and grant no relief in equity (*h*). It has been said that if, during the existence of a lease, such a breach of covenant was committed by the tenant that a court of equity would not have interfered to prevent the landlord from taking advantage of the forfeiture of the lease had he known of

(*d*) As to an under-lessee's right to relief against forfeiture, see the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), s. 4.

(*e*) See *e.g.*, *Coward v. Gregory* (1866), L. R. 2 C. P. 153.

(*f*) *Hill v. Barclay* (1810), 16 Ves. 402, 406.

(*g*) *Hill v. Barclay* (1811), 18 Ves. 56; 16 Ves. 402; *White v. Warner* (1817), 2 Mer. 459.

(*h*) *Gourlay v. Duke of Somerset* (1812), 1 V. & B. 68; *Coppinger v. Gubbins* (1846), 9 Ir. Eq. Rep. 304; 3 Jo. & Lat. 397; *Lovat v. Lord Ranelagh* (1814), 3 V. & B. 29.

the breach and proceeded to determine the lease, the landlord ought not to be placed in a worse situation after the expiration of the term, than he would have been in had he known of the breach and availed himself of it before the term expired (*i*).

(*i*) *Thompson v. Guyon* (1831), 5 Sim. 65, 72.

CHAPTER VIII.

BOUNDARIES OF PAROCHIAL AND OTHER AREAS.

SECT.	PAGE
1.— <i>Concerning Parochial Boundaries Generally</i>	155
2.— <i>Statutory Provisions as to the Adjustment of Parochial and other Areas</i>	159
SUB-SECT.	
1.— <i>Under the Land Drainage Acts</i>	159
2.— <i>Under the Tithe Acts</i>	160
3.— <i>Under the Local Government Acts...</i>	164
4.— <i>Under the Inclosure Acts</i>	171
5.— <i>Under the Highway Acts</i>	175

SECTION 1.—CONCERNING PAROCHIAL BOUNDARIES
GENERALLY.**Blackstone's Statement as to the Origin of Parishes.**

—"The division of the county into parishes," says Blackstone, "probably took place not all at once, but by degrees; for it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by (or with reference to) those of a manor or manors,—it very seldom happening that a manor extends itself over more parishes than one, though there may be several manors in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes to accommodate their tenants in one or two adjoining lordships, and, in order to have divine service regularly performed therein, they obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish. Which consideration accounts for the frequent intermixture of parishes with one another;

for if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly-erected church with the tithes of those disjointed lands,—especially if no church was then built in any lordship adjoining to those outlying parcels” (a).

It has been observed by a writer of authority on this subject (b), that the boundaries of parishes were not definitely settled until long after the foundation of churches; and the ecclesiastical districts which formerly belonged to parishes at their first institution, have been since much varied—and in many cases abridged and narrowed—when new churches were built.

It is to be observed, also, that a district may belong to one parish for ecclesiastical purposes, and be joined to another parish for civil purposes (c).

Variation in the ancient limits of parishes has been effected, as regards their ecclesiastical aspect and for ecclesiastical purposes, by Orders in Council ratifying schemes promulgated under various public statutes,—principally under the Church Building Acts (d) and the New Parishes

(a) 1 Bl. Com. 113, 114; 1 Still. 244.

(b) Selden, Vol. 3, pt. 2, pp. 1121, 1122; and see *Lousley v. Hayward*, 1 Yo. & Jer. 586.

(c) An instance of confusion of this kind occurred in *R. v. Watson* (1868), L. R. 3 Q. B. 762. In that case questions arose with regard to the district of Tranby, which lay adjacent to the two parishes of Hessle and Kirk Ella in Yorkshire. It appeared that for a hundred years and more, the lands in Tranby had been rated to the poor and highway rates of Hessle, and that the overseers and surveyors of Hessle had always acted for Tranby as part of their district, but that the lands in Tranby from the earliest period had been titheable to Kirk Ella, and that as to all ecclesiastical matters Tranby had uniformly and immemorially been treated and reputed as part of the parish of Kirk Ella. The court considered that a usage which had existed so long ought to be supported, and assumed that it could have had a legal origin.

(d) See Church Building Act, 1818 (58 Geo. 3, c. 45); Church Building Act, 1819 (59 Geo. 3, c. 134); Church Building Act, 1822 (3 Geo. 4, c. 72); Church Building Act, 1824 (5 Geo. 4, c. 103); Church Building Act, 1827 (7 & 8 Geo. 4, c. 72); Church

Acts (*e*). Prior to 1818 this variation was generally effected by local Acts.

The ancient limits of parishes were utilised and, except where varied by statute, still are largely utilised for civil administrative purposes.

It was a maxim or rule of the common law, that the boundaries of parishes were to be tried exclusively in the temporal courts, and this, notwithstanding that in early times the clergy insisted on trying such boundaries in their own courts, on the ground that they were purely spiritual. Therefore in the case of such a suit brought in the Ecclesiastical Courts by a rector against a layman, a prohibition would, in general, issue (*f*).

Where the vicar claimed all the tithes in a certain vill in the parish, and the parson all the tithes in the residue of the parish, and the question between them was whether certain land of which the vicar claimed tithes was in that vill or not,—as the dispute was one between spiritual persons only (*scilicet*, between the parson and the vicar), although the parson was a layman, and the parsonage

Building Act, 1831 (1 & 2 Will. 4, c. 38); Church Building Act, 1832 (2 & 3 Will. 4, c. 61); Church Building Act, 1838 (1 & 2 Vict. c. 107); Church Building Act, 1839 (2 & 3 Vict. c. 49); Church Building Act, 1840 (3 & 4 Vict. c. 60); Church Building (Banns and Marriages) Act, 1844 (7 & 8 Vict. c. 56); Church Building Act, 1845 (8 & 9 Vict. c. 70); Church Building (Burial Service in Chapels) Act, 1846 (9 & 10 Vict. c. 68); Church Building Act, 1848 (11 & 12 Vict. c. 37); Church Building Act, 1851 (14 & 15 Vict. c. 97); Church Building Act, 1854 (17 & 18 Vict. c. 32); Church Building Commissioners (Transfer of Powers) Act, 1856 (19 & 20 Vict. c. 55); New Parishes Acts and Church Building Acts Amendment Act, 1884 (47 & 48 Vict. c. 65).

(*e*) See New Parishes Act, 1843 (6 & 7 Vict. c. 37); New Parishes Act, 1844 (7 & 8 Vict. c. 94); New Parishes Act, 1856 (19 & 20 Vict. c. 104); New Parishes Acts and Church Building Acts Amendment Act, 1869 (32 & 33 Vict. c. 94); New Parishes Acts and Church Building Acts Amendment Act, 1884 (47 & 48 Vict. c. 65).

(*f*) *Stransham v. Cullington* (1591), Cro. Eliz. 228; *Transham's Case* (1590), Cro. Eliz. 178.

improper to a lay fee, it was held that the question of the boundaries of the vill should nevertheless be tried in the spiritual court; and that a prohibition would not in such a case be granted (*g*).

Presumptions with Regard to Parish Boundaries in Certain Cases.—Where two parishes are separated by a road, the line dividing the parishes is presumed, in default of evidence to the contrary, to coincide with the *medium filum* of the road (*h*), just as in the case of private properties similarly separated by a highway (*i*): so, where two parishes are separated by a non-tidal river, and there is no positive evidence of the boundary line between them, it is to be presumed to coincide with the middle line of the river (*k*).

Two parishes may become very much mixed up in their respective parochial administrations, but that will not make them one parish, even although their lands also are equally intermixed and confused (*l*).

(*g*) *Ives v. Wright*, 2 Roll. Abr. 312.

(*h*) *R. v. Board of Works for the Strand District* (1863), 4 B. & S. 526. "In conveyances and Acts of Parliament upon which questions of law have arisen, where land was conveyed or a district constituted with specified boundaries, and one of those boundaries consisted of a highway or a river, we never find it described as the *medium filum* of the highway or river, and it is clear . . . that if language like the present had appeared in an ordinary conveyance, it would have been considered as including the land *ad medium filum viæ*. Then why should we put a different construction upon this Act of Parliament? . . . Before the passing of the Act of 30 Car. 2, the parishes of St. Martin-in-the-Fields and St. Marylebone were co-terminous, divided by a great highway now known as Oxford Street, the legal presumption being that such highway which then divided the parishes was divided *ad medium filum* between them." *Per* COCKBURN, C.J., at p. 551, citing *Berridge v. Ward* (1861), 10 C. B. (N.S.) 400.

(*i*) See pp. 179 *et seq.*, *post*, and p. 42, *ante*.

(*k*) *R. v. Landulph* (1834), 1 M. & Rob. 393; *Bridgewater Trustees v. Bootle* (1867), L. R. 2 Q. B. 348; 7 B. & S. 4. See also pp. 42 *et seq.*, *ante*.

(*l*) *R. v. Tomblason* (1863), 27 J. P. 150.

Perambulations.—Perambulations were formerly much resorted to as a method of preserving notoriety as to the position of parish boundaries (*m*). This practice was well calculated to serve the purpose in view. That it was inconvenient for private owners whose lands lay by the parish boundary cannot be doubted. Yet none the less immemorial custom subjected these lands in many cases to a *quasi* easement (*n*). We find several cases where owners have sought to combat the traversing of their lands by the perambulators.

Parishioners might, however, in their perambulations according to the prevailing custom justify going over any man's land, and might also abate all nuisances in their way (*o*). Nevertheless, a custom for the inhabitants of a parish to enter a particular house, which is neither upon the boundary line or in any manner wanted in the course of the perambulations, cannot be supported (*p*) ; nor will entries in parish books, recording the fact that the perambulations have usually taken a particular line, be evidence in support of such an alleged custom (*q*)—for the custom, being unreasonable, cannot be upheld as a valid one.

SECTION 2.—STATUTORY PROVISIONS WITH REGARD TO THE ADJUSTMENT OF PAROCHIAL AND OTHER AREAS.

Sub-section 1.—Under the Land Drainage Acts.

The Land Drainage Act, 1861.—By the Land Drainage Act, 1861 (*r*), it was provided that if it happened that by virtue or in exercise of the powers given by that Act, any

(*m*) As to the general practice of perambulation and its significance as regards evidence, see p. 243, *post*.

(*n*) See *Goodday v. Michell* (1595), Cro. Eliz. 441 ; *Taylor v. Devey* (1837), 7 A. & E. 409 ; *Grant v. Kearney* (1823), 12 Price, 773.

(*o*) *Goodday v. Michell* (1595), Cro. Eliz. 441 ; *Viner's Abr. Perambulations*.

(*p*) *Taylor v. Devey* (1837), 7 A. & E. 409, 416 ; *Ipswich Docks v. St. Peter's*, 7 B. & S. 310, 346.

(*q*) *Taylor v. Devey* (1837), 7 A. & E. 409, 416.

(*r*) 24 & 25 Vict. c. 133, s. 62.

watercourse forming a boundary line between two or more counties, hundreds, parishes, or other areas defined by law were straightened, widened or otherwise altered, so as to affect its character as a boundary line, notice of the circumstances should be given to commissioners (whose duties and powers have since been vested in the Board of Agriculture and Fisheries (*s*)). Upon receiving such a notice the Act provided that the commissioners might, if satisfied that a new boundary line might be adopted with convenience, declare, with the formalities required by the Act, that the watercourse, as altered, should be wholly or partially substituted for the former boundary line—and, in that case, the limits of the areas of which the watercourse, when unaltered, was the boundary should be deemed to be varied accordingly ; or the commissioners might, if they thought proper, require the old boundaries to be retained as they existed before the alteration in the watercourse.

Sub-section 2.—Under the Tithe Acts.

Under the Tithe Commutation Acts.—The Tithe Act, 1836 (*t*), provided that, if there should be any suit or question touching the situation or boundary of any lands, whereby the making or executing of any agreement under the provisions of the Act should be hindered, the owners of such lands, being parties to such suit or difference, might submit the same to reference by any writing under their hands, containing an agreement that such submission should be made a rule of court, and upon such terms of reference as the parties might agree upon. The decision of the arbitrator named in the reference was, for the purposes of the Act, to be final and conclusive on all persons. It was also provided that the submission of persons having an estate less than a fee simple or fee tail,

(*s*) See The Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 48 ; the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2 (1) ; the Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31).

(*t*) 6 & 7 Will. 4, c. 71, s. 24.

should not bind persons entitled in reversion, remainder, or expectancy, without the sanction of commissioners (whose duties have since been, and now are, vested in the Board of Agriculture and Fisheries (*u*)), who might direct any person having an estate of inheritance in remainder, reversion, or expectancy, or who was otherwise interested in the question, to be made a party to the reference.

The commissioners were also empowered to hear and determine disputes relating to the situation or boundary of any lands whereby the making of any award under the Act should be hindered (*x*); and the award, when made, was to be confirmed by the commissioners, and binding on all parties after confirmation (*y*).

It has been held that the Tithe Act, 1836, did not empower the commissioners to settle disputes as to parish boundaries, but only disputes as regards boundaries of private estates (*z*).

As regards parishes or other similar districts, it was enacted by the Tithe Commutation Amendment Act, 1838 (*a*), that two-thirds in value of the owners of the lands in the parish or district, the tithes of which were to be commuted, and respecting the boundaries of which any dispute or doubt should arise, might, by writing under their hands, request the commissioners to inquire into, ascertain, and settle the boundaries; and thereupon the commissioners were required to inquire into, ascertain, and set out the boundaries of the parish or district in accordance with the procedure in that behalf appointed by the Act; and within one month after ascertaining and setting out

(*u*) See The Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 48; the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2; the Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31).

(*x*) 6 & 7 Will. 4, c. 71, ss. 45, 46. See also *Girdlestone v. Stanley*, 3 Y. & Coll. 421.

(*y*) 6 & 7 Will. 4, c. 71, s. 52.

(*z*) *Re Ystradgunlais Tithe Commutation* (1844), 8 Q. B. 32.

(*a*) 7 Will. 4 and 1 Vict. c. 69.

the boundaries, the commissioners were required to publish the same, by causing a description thereof in writing to be delivered to one of the churchwardens or overseers of the parish or district, the boundary of which should be so set out, and also to one of the churchwardens or overseers of every parish or district adjacent or adjoining thereto, and to every landowner through whose lands the boundary so set out was to pass (*b*).

It has been held that this Act gave the Board no power to set out new boundaries, but only to ascertain and settle the old ones (*c*). By the Tithe Commutation Amendment Act, 1839 (*d*), both with regard to private estates and parishes and similar districts—it was enacted (*e*), that if there was any question between any parishes or townships, or between any two or more landowners, touching the boundaries of such parishes or townships, or the lands of such landowners respectively, or if such parishes or townships, or such landowners should be desirous of having such boundaries ascertained, or a new boundary line defined, the commissioners might, on the application in writing (in the case of parishes or townships), of a majority of not less than two-thirds in number and value of the landowners of such parishes or townships, or (in the case of private estates) on the application in writing of the landowners, including (in the case of copyhold lands) the lord of the manor, deal with any dispute or question concerning such boundaries, and might ascertain, set out, and define the ancient boundaries between such parishes or townships or the lands of such landowners respectively, or draw and define a new line of boundary.

Ascertainment of the Boundaries of Glebe Land.—
By the Tithe Act, 1842 (*f*), it was enacted that for the

(*b*) 7 Will. 4 and 1 Vict. c. 69, s. 2.

(*c*) *R. v. Hobson* (1850), 19 L. J. Q. B. 262; *In re Dent Commutation* (1845), 8 Q. B. 43.

(*d*) 2 & 3 Vict. c. 62.

(*e*) 2 & 3 Vict. c. 62, s. 34.

(*f*) 5 & 6 Vict. c. 54.

purpose of defining and settling the glebe lands of any benefice, on the application of the spiritual person to whom the glebe, in right of such benefice, should belong, and with the consent of the landowners claiming title to the land so defined as glebe, and in possession thereof, the Tithe Commissioners(*a*), both before and after completion of any tithe commutation, should have the same powers relative to the glebe lands and for ascertaining and defining the boundaries thereof, as they had relative to the boundaries of the lands of any landowners under the provisions of the Tithe Commutation Acts. By the same statute(*b*) it was also provided that in every such case, the commissioners should make their award, in like manner as in the case of awards under the Tithe Commutation Act, 1836, setting forth the contents, description, and boundary of the glebe lands, as finally settled by it, and of the lands (if any) awarded to the landowners.

Variation of Apportionment of Tithe Commutation Rentcharge where Parish Boundaries have been altered.

—By the Tithe Act, 1860(*c*), the Tithe Commissioners were empowered to alter, vary, or change the apportionment of the commutation rentcharge in any parish—when the boundaries of the parish should have been set out afresh under any Inclosure Act or otherwise—if it should appear that the original apportionment of the rentcharge in such parish was, by reason of such new definition of boundaries, rendered inconvenient. The same Act(*d*) also provided that where, from error as to boundary or otherwise, any apportioned commutation rentcharge shall have been charged on lands not within the parish which

(*a*) The rights and duties of these commissioners have since been vested in the Board of Agriculture and Fisheries. See p. 161, *ante*, note (*u*).

(*b*) 5 & 6 Vict. c. 54, s. 5.

(*c*) 23 & 24 Vict. c. 93, s. 16.

(*d*) *Ibid.*, s. 33.

is made subject to the aggregate rentcharge, the Tithe Commissioners should be empowered to direct the redemption thereof ; and that if there should be any question touching the situation and boundary of any lands alleged to have been improperly included in the original tithe apportionment, the Tithe Commissioners should have the same power of ascertaining and settling the situation and boundary, as they had under the Tithe Commutation Act, 1836, for making the original apportionment.

Sub-section 3.—Under the Local Government Acts.

The Public Health Act, 1875.—The Local Government Act, 1858 (*e*), contained a provision for the ascertainment of the boundaries of any “place” not having a known and defined boundary. This Act was repealed by the Public Health Act, 1875 (*f*), but the provision mentioned was substantially adopted in the last-mentioned Act, s. 272 of which enacts that a petition may be presented to the Local Government Board from any “place” situated in any rural district and not having a known and defined boundary, to settle its boundary for the purpose of that Act. The petition must state the proposed boundaries of the place, and must be signed by one-tenth of the persons rated to the relief of the poor and resident within such boundaries. It must be supported with such evidence as the Local Government Board may require. The Board is empowered after local inquiry as to the genuineness of the petition, and as to the propriety of the proposed boundaries, to dismiss the petition or to make an order as to the boundaries of the place ; and it is also empowered to make an order as to costs. When the boundaries have been so settled the place is to be deemed for the purposes of that Act to be a place with a known and defined boundary (*g*).

(*e*) 21 & 22 Vict. c. 98. See s. 16.

(*f*) 38 & 39 Vict. c. 55, s. 343.

(*g*) *Ibid.*, s. 272. As to what is a place having a known and defined boundary, see *R. v. Northowram and Clayton (Ratepayers)*

The Local Government (Boundaries) Act, 1887.—Under the Local Government (Boundaries) Act, 1887 (*h*), special boundaries commissioners for England and Wales were appointed to inquire respecting each county as to the best method of adjusting the county boundaries and those of other local areas of local government in such a manner as to arrange that no sanitary district, borough, union, or parish should lie within the bounds of more counties than one; and as to the best method of dealing with parts of the county wholly or almost detached from it; and as to the best method of dealing with cases where a borough was not an urban sanitary district, and was wholly or partly comprised in an urban sanitary district; and as to altering boundaries, combining areas, or making administrative arrangements in relation to any alteration that might be recommended by them in the boundaries of any area of local government.

It was also provided that financial and administrative considerations should be duly regarded by the commissioners in making their recommendations, and that they should, as soon as possible, make a report as to their proceedings to the Local Government Board, and that the report should be laid before Parliament.

This Act has now expired, and the duties and powers of the commissioners have therefore become inoperative.

The Local Government Act, 1888.—Under the Local Government Act, 1888 (*i*), it was provided that every report made by the boundary commissioners under the Local Government (Boundaries) Act, 1887 (*k*), should be laid before the council of any administrative county or county borough affected by their report, which should be taken into consideration by the council who were to make

(1865), L. R. 1 Q. B. 110; *R. v. Hardy* (*Secretary of State for the Home Department*) (1868), L. R. 4 Q. B. 117.

(*h*) 50 & 51 Vict. c. 61.

(*i*) 51 & 52 Vict. c. 41.

(*k*) 50 & 51 Vict. c. 61.

such representations to the Local Government Board as they thought expedient for the adjustment of the boundaries of their county, and of other areas of local government partly situate in their county, with the object of securing that no such area should be situate in more than one county (*l*).

Section 54 of the Local Government Act, 1888, enacts in effect as follows, that when the council of any county or borough has represented to the Local Government Board that the alteration of the boundary of the county or borough is desirable; or that the union for the purposes of the Act of a county borough with a county is desirable; or that the union of any counties or boroughs, or the division of any county is desirable; or that the alteration of the boundary of any electoral division of a county, or of any area of local government partly situate in the county or borough, is desirable, the Local Government Board shall, unless for special reasons they think that the representation should not be entertained, cause a local inquiry to be made, and may either make or refuse an order for the proposal contained in such representation. The same section of the last-mentioned Act provided that in default of such representation by the council before the first day of November, 1889, the Local Government Board might cause the making of such local inquiry, and thereupon might make such order as they thought expedient. It also provided that if the order alters the boundary of a county or borough, or provides for the union of a county borough with a county, or for the union of any counties or boroughs, or for the division of any county, it should be provisional only, and not effective unless confirmed by Parliament.

(*l*) 51 & 52 Vict. c. 41, s. 53.

Under the Local Government Act, 1894 (56 & 57 Vict. c. 73, s. 36 (12)), the report must be laid also before any joint committee of county councils, and it is the duty of such joint committee to take such reports into consideration before framing any order under the powers conferred on them.

Section 57 of the last-mentioned Act (*m*) enacts, in effect, that whenever a *prima facie* case respecting any county district not a borough, or any parish, for a proposal for any of the following things, viz. : (1) The alteration or definition of the boundary thereof ; (2) the division thereof or the union thereof with any other such district or districts, parish or parishes, or the transfer of part of a parish to another parish ; (3) the conversion of any such district or part thereof, if it is a rural district, into an urban district, and *vice versa*, or the transfer of the whole or any part of any such district from one district to another, and the formation of new urban or rural districts ; (4) the division of an urban district into wards ; and (5) the alteration of the number of wards, or of the boundaries of any ward, or of the number of members of any district council, or of the apportionment of such members among the wards, the county council may cause an inquiry to be made as to the desirability thereof in the locality, upon notice given in that locality, and to the Local Government Board, Education Department or other interested Government department ; and if satisfied that the proposal is desirable, make an order carrying the proposal into effect. The last-mentioned section also provides for the giving of due notice of the provisions of the order (*n*), which order comes into operation upon its final approval by the county council when it relates to the alteration of the boundaries of a ward (*o*). In other cases the order must be submitted to the Local Government Board ; who may cause a local

(*m*) 51 & 52 Vict. c. 41. Part of a parish may be added by an order of a county council to an adjacent parish, and consequently become part of the poor law union in which the latter parish is situate, notwithstanding that the parishes were originally in different unions, and that the Local Government Board has not altered the boundaries of the unions (*Bootle Union v. Whitehaven Union*, 19 T. L. R. 453).

(*n*) 51 & 52 Vict. c. 41, s. 57 (2).

(*o*) *Ibid.* See also s. 71 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), providing that the order must be sent to the Local Government Board and to the Board of Agriculture. See also 3 Edw. 7, c. 31.

inquiry to be made, and determine whether the order is to be confirmed or not, if within three months (*p*) after notice of the provisions of the order which the Board determine to be the first notice there be a petition for the disallowance of the order; if, however, such petition be not presented, or be withdrawn after presentation, the Local Government Board must confirm the order with modifications therein if necessary. It must be observed, however, that any order that is confirmed by the Local Government Board is to be laid before Parliament, and that the powers of the Local Government Board in respect of the union or division or alteration of parishes are not diminished but increased by the foregoing section (*q*).

The Local Government Act, 1894.—By the Local Government Act, 1894 (*r*), it is provided that where any of the areas referred to in s. 57 of the Local Government Act, 1888, is situate in two or more counties, or the alteration of any such area would alter the boundaries of a poor law union situate in two or more counties, a joint committee, appointed by the councils of those counties, shall be deemed always to have had power to make orders under that section with respect to that area; and where, on March 5th, 1894, a rural sanitary district or parish was situate in more than one county, a joint committee of the councils of those counties shall act thereunder, and if any of those councils do not, within two months after request from any other of them, appoint members of such joint committee, the members of the committee actually appointed shall act as the joint committee (*s*). It also provides that any question arising as to the constitution or procedure of any such joint committee shall, if the county councils concerned fail to agree, be determined by the Local Government Board (*t*).

(*p*) Now reduced to six weeks. See the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 41.

(*q*) 51 & 52 Vict. c. 41, s. 57 (2)—(7).

(*r*) 56 & 57 Vict. c. 73.

(*s*) *Ibid.*, s. 36 (11).

(*t*) *Ibid.*

The same Act also provides (*u*) that every county council should immediately take into consideration the cases within their county of every parish and rural sanitary district (*w*), which on March 5th, 1894, was situate partly within and partly without an administrative county, and of every parish which at that date was partly within and partly without a sanitary district, and of every rural sanitary district which had a population of less than two hundred, and of every rural sanitary district which at the above date had less than five elective guardians capable of acting and voting as members of the rural sanitary authority of the district, and of every rural parish which was coextensive with a rural sanitary district (*y*); and whether any proposal had or had not been made as mentioned in s. 57 of the Local Government Act, 1888 (*z*), should, as soon as practicable in accordance with that section, cause inquiries to be made and notices given, and make such orders, if any, as they deemed most suitable for carrying the Act into effect in accordance with the following provisions, namely, that the whole of each parish and, unless the county council for special reasons otherwise directed, the whole of each rural district should be within the same administrative county; and that the whole of each parish should, unless the county council for special reasons otherwise directed, be within the same county district (*a*).

It was further provided (*b*) that, where a parish was at the passing of the Act situate in more than one urban district, the parts of the parish in each such district should, from a named day, unless otherwise directed, and subject to any alteration of area made in pursuance of any Act,

(*u*) 56 & 57 Vict. c. 73.

(*x*) Rural sanitary districts consist of the area of any union not coincident in area with an urban district, or wholly included in an urban district with the exception of those portions of the area that are included in an urban district (38 & 39 Vict. c. 55, s. 9).

(*y*) 56 & 57 Vict. c. 73, s. 36 (1).

(*z*) 51 & 52 Vict. c. 41. See p. 167, *ante*.

(*a*) 56 & 57 Vict. c. 73, s. 36 (1) (i).

(*b*) *Ibid.*, s. 36 (2).

be separate parishes, in like manner as if they had been constituted separate parishes under the Divided Parishes and Poor Law Amendment Act, 1876, and the Acts amending the same (*c*).

Again, it was provided (*d*) that, where an alteration of the boundary of a county or borough seems expedient for any of the foregoing purposes, application should be made to the Local Government Board for an order under s. 54 of the Local Government Act, 1888 (*e*).

And where the alteration of a poor law union seems expedient by reason of the Act, the county council may, by order, provide for such alteration in accordance with s. 58 of the Local Government Act, 1888, or otherwise, provided that the powers of the Local Government Board with respect to the alterations of unions be not affected (*f*).

It was further provided (*g*) that, where an order for the alteration of a boundary of any parish or division thereof, or the union thereof or of any part thereof with another parish, was proposed to be made after a named day, notice thereof should, a reasonable time before the making of the order, be given to the parish council of the parish, or if there was no parish council, to the parish meeting, either of which, as the case may be, should have the right to appear at any inquiry held by the county council with reference to the order, and should be at liberty to petition the

(*c*) See 39 & 40 Vict. c. 61, which empowered the Local Government Board, whenever any parish was divided so as to have its parts or any of them isolated in some parish or otherwise detached, to make an order, after local inquiry to be held after notice thereof given, either for constituting separate parishes out of the divided parish, or for amalgamating some of the parts thereof with the parish or parishes in which they might be included, or to which they might be annexed, and providing, if necessary, for a change of the county of the parish or of a part thereof. See also 45 & 46 Vict. c. 58.

(*d*) 56 & 57 Vict. c. 73, s. 36 (5).

(*e*) See p. 166, *ante*.

(*f*) 56 & 57 Vict. c. 73, s. 36 (6).

(*g*) *Ibid.*, s. 36 (7).

Local Government Board against the confirmation of the order. It was also provided (*h*) that, where the alteration of a boundary of any parish, or the division thereof or the union thereof, or of part thereof with another parish, seemed expedient for any of the purposes of the Act, provision for such alteration, division or union might be made by an order of the county council, confirmed by the Local Government Board, under s. 57 of the Local Government Act, 1888 (*i*).

The Act also provides (*k*) that, any order made by a county council with respect to areas and boundaries under the Act, shall be deemed to be an order made under s. 57 of the Local Government Act, 1888, and any board of guardians affected by an order shall have the same right of petitioning against that order as is given by that section or by any other authority.

Sub-section 4.—Under the Inclosure Acts.

The Inclosure Act, 1845.—Section 39 of the Inclosure Act, 1845 (*l*), provided that in case the valuer acting in the matter of any inclosure represented to the commissioners (whose powers and duties generally are now vested and exercisable by the Board of Agriculture and Fisheries (*m*)) that the boundaries of any parish or manor, in which the land proposed to be inclosed, or any part thereof, should be situate, and of any parish or manor adjoining thereto, were not then sufficiently ascertained and distinguished, the commissioners, after giving certain prescribed notices for the protection of the rights of all persons interested in the question, might ascertain, set out, and fix the boundaries

(*h*) 56 & 57 Vict. c. 73, s. 36 (8).

(*i*) See p. 167, *ante*.

(*k*) 56 & 57 Vict. c. 73, s. 36 (10).

(*l*) 8 & 9 Vict. c. 118, s. 39. See also 15 & 16 Vict. c. 79, ss. 25, 26; *R. v. Washbrook* (1825), 4 B. & C. 732; *R. v. Lancashire* (1818), 1 B. & Ald. 630.

(*m*) 52 & 53 Vict. c. 30; 3 Edw. 7, c. 31.

of such parishes and manors respectively ; but that any person interested in the determination of the commissioners might have the matter determined by a jury, or might apply to the Court of Queen's Bench to remove the matter into that court by *certiorari* ; and in the case of any such application, the decision or finding of the jury or of the court should be conclusive as to the boundaries of the parish or manor.

Section 45 of the same Act provided that for the purpose of shortening or rendering straight any boundary fences between the land to be inclosed and adjoining lands, the valuer, with the consent of the person interested in such adjoining land, might set out and determine the boundaries between the land to be inclosed and such adjoining land (*n*).

By the Inclosure Act, 1849 (*o*), all the provisions of the Inclosure Act, 1845, and of certain other specified Acts, applicable to the ascertainment, setting out, and fixing of the boundaries of any parish or manor, in which the land proposed to be inclosed, or any part thereof, should be situate, and of any parish or manor adjoining thereto, were extended and made applicable to the ascertainment, setting out, and fixing of the boundaries of any township, vill, hamlet, or tithing not having separate overseers of the poor,—and of a manor, although the same should not abut or adjoin upon any other manor.

The Inclosure Act, 1849 (*p*), also provided that in inclosure proceedings, where no dispute should be pending as to the parish (*pp*) in which the lands should be situate, the valuer might, with the approbation of the commissioners, declare in his award how much and which part of any

(*n*) 8 & 9 Vict. c. 118, s. 45. See also p. 195, *post*.

(*o*) 12 & 13 Vict. c. 83, s. 9. See also 15 & 16 Vict. c. 79, s. 28.

(*p*) 12 & 13 Vict. c. 83, s. 1.

(*pp*) The term "parish," as here used, was defined by the Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 28, as meaning and including a district having a separate surveyor of highways.

of the lands to be allotted, divided, or dealt with by his award, or of any roads passing over or through the same, should be considered in the parish or parishes in which any of them should be situate ; but that his award should be confirmed by the commissioners ; and, where the boundaries of any counties were to be affected by the award, the commissioners were not to confirm it, unless and until notice had been given to the clerks of the peace for the respective counties ; and on receiving such notice, the respective counties might, by their clerks, object to the award in the manner mentioned in the Act ; and, in that case, the award, so far as it related to the boundaries of the counties, was not to be confirmed by the commissioners.

Provisions in the Inclosure Acts for Redistribution of Land where Parcels are inconveniently Intermixed.

—The Board of Agriculture and Fisheries has power under a jurisdiction originally created by the Inclosure Acts, to redistribute parcels amongst owners where those parcels have become inconveniently intermixed ; and this, although the land is not subject to be inclosed. The powers also apply where land is subject to be inclosed but no proceedings for inclosure are pending (*q*).

Redistribution of Parcels under the Inclosure Act, 1845.—The Inclosure Act, 1845 (*r*), provided as regards lands not subject to be inclosed, or as to which no inclosure proceeding should be pending, that where such lands should be so intermixed or where the parcels should be inconvenient in form or in quantity, so that the same could not be cultivated or occupied to the best advantage, then the commissioners might, on application of the several landowners, make a new division and allotment of the lands.

(*q*) The statutory provisions originally creating this jurisdiction will be found in the following paragraphs of the text. As to the statutes vesting the powers of the Inclosure Commissioners in the Board of Agriculture and Fisheries, see p. 161, *ante*, note (*u*).

(*r*) 8 & 9 Vict. c. 118, s. 148.

Provisions in the Inclosure Act, 1846, as to the Redistribution of Intermixed Copyholds.—The Inclosure Act, 1846 (*s*), provided that where any copyhold or customary land should be intermixed or held or occupied together with land of freehold tenure or with copyhold or customary land held of another manor, or under other customs or titles, and such copyhold or customary land could not be identified by the descriptions thereof on the rolls of the manor, and the situation or boundaries of such freehold and copyhold or customary lands respectively should be unknown or unascertained, whether such lands should or should not be subject to be inclosed under the Inclosure Acts, and whether any proceedings for an inclosure thereof should or should not be pending, it should be lawful for the commissioners, upon the application in writing of the persons interested in such lands, and with the consent of the lord or lords of the manor or respective manors of which such copyhold or customary lands should be holden, to appoint any person to award and declare what part of the lands so intermixed or held or occupied together should be and be deemed copyhold or customary land and freehold land respectively, or should respectively be held of each such manor, or under each of such customs or titles respectively, or to determine and declare the situation and boundary thereof, as the case might require.

Similar powers were given to the Inclosure Commissioners, by the last-mentioned Act, to appoint persons to determine the boundaries of leaseholds intermixed with lands of copyhold or customary tenure (*t*).

Powers under the Inclosure Acts to adjust Boundaries when apportioning Rents.—Under the Inclosure Act, 1854 (*u*), power was given to the commissioners, on the application of the parties interested, where lands or hereditaments were charged with any rent or other fixed

(*s*) 9 & 10 Vict. c. 70, s. 6.

(*t*) *Ibid.*, s. 8.

(*u*) 17 & 18 Vict. c. 97, s. 10.

payment, to apportion the rent or other fixed payment among all the lands charged therewith. The Act requires an inquiry to be made into the expediency of the apportionment (*x*). Where there is any doubt as to the extent, identity, or boundaries of the lands charged, the Act provided for an inquiry into the matter, and after this inquiry for the issue of an order for the apportionment of the rentcharge or annual payment, or (as the case may be) for the settlement of the boundaries (*y*).

Sub-section 5.—Under the Highway Acts.

The Highway Act, 1835.—The Highway Act, 1835 (*z*), contained provisions to meet the case where the boundaries of a parish ran along the centre of a highway. It is obvious that in such cases inconvenience would have been caused but for these provisions with regard to the question of repairs to the highway; for one authority would have jurisdiction over one half of the road, and another authority over the other half. Section 58 of the Act provided that where boundaries of parishes passed across or through the middle of a common highway, the justices, at a special sessions for the highways (*a*), on complaint made by the surveyor of any parish, in the form and in the manner specified in the Act, might summon the surveyor (*b*) of any other parish adjoining and bounding on such common highway to appear before them. After hearing both parties and their witnesses, the justices were empowered to divide the whole of the

(*x*) *Ibid.* The valuer was also directed to draw up an award describing, amongst other things, the boundaries which should have been ascertained and set out under the provisions of the Act, with a map annexed thereto, but which may in certain cases be dispensed with. See 25 & 26 Vict. c. 53, s. 14.

(*y*) 17 & 18 Vict. c. 97, ss. 10, 11.

(*z*) 5 & 6 Will. 4, c. 50.

(*a*) Under the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 46, justices in petty sessions may now exercise this jurisdiction.

(*b*) Now the district councils. See The Public Health Act, 1875, s. 144; the Local Government Act, 1894, s. 25.

highway, by a transverse line across it, into equal parts,—or else into such unequal parts and proportions as, upon a consideration of the soil, waters, floods, and inequality of the highway, or any other circumstances attending the same, the justices should in their discretion think just and right (*c*). They were also empowered to determine which of such parts or divisions should be repaired by each of the respective parishes (*d*). The Act also provided that the order of the justices, together with a plan of the highway and of the aforesaid division thereof, should be filed with the clerk of the peace of the county in which the highway should lie (*e*) ; and that the justices should cause posts, stones, or other boundaries to be set up for the better ascertaining the division and allotment (*f*).

Nothing in the Act, however, affects or alters in any manner whatsoever any boundaries of counties, lordships, hundreds, manors, or any other divisions of public or private property,—or the boundaries of any parishes or townships,—otherwise than for the purpose of amending and keeping in repair the particular portions of the highway (*g*).

(*c*) 5 & 6 Will. 4, c. 50, s. 58.

(*d*) *Ibid.*

(*e*) *Ibid.* See *R. v. Washbrook (Inhabitants)* (1825), 4 B. & C. 732. As to the order being conclusive as to the liability of the parishes to repair, see *R. v. Hickling* (1845), 7 Q. B. 880.

(*f*) 5 & 6 Will. 4, c. 50, s. 58.

(*g*) *Ibid.*, s. 61.

CHAPTER IX.

BOUNDARIES OF HIGHWAYS AND PRIVATE WAYS.

SECT.	PAGE
1.— <i>Concerning Highways Generally</i>	177
2.— <i>Relationship between Ownership and the Repair of Roads</i>	184
3.— <i>Prevention of Encroachments on Highways</i>	190
4.— <i>Inclosure Roads</i>	195

SECTION 1.—CONCERNING HIGHWAYS GENERALLY.

Presumptions with Regard to the Extent of a Highway.—Where there are fences on both sides of a highway there is a presumption that the whole of the surface between the fences has been dedicated to the public right of passage (*a*) ; and, *primâ facie*, the public are entitled to use the whole space for the purposes of passage (*b*). This presumption applies whether the space between the fences is of uniform width or of varying width (*c*). In such a case the public right of passage is not *primâ facie* confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers (*d*).

(*a*) *Offin v. Rochford Rural Council*, [1906] 1 Ch. 342 ; *R. v. United Kingdom Electric Telegraph Co.* (1862), 8 Jur. (N.S.) 1153 ; *R. v. Wright* (1832), 3 B. & Ad. 681 ; *Harvey v. Truro Rural District Council* (1903), 19 T. L. R. 576. *Cf. Neeld v. Hendon Urban District Council* (1899), 81 L. T. 406 ; *Belmore v. Kent County Council*, [1901] 1 Ch. 873.

(*b*) See the cases cited in the last note.

(*c*) *Offin v. Rochford Rural Council*, *supra* ; *Locke-King v. Woking Urban District Council* (1898), 77 L. T. 790.

(*d*) *R. v. Wright*, *supra* ; and see the cases cited above ; *Nicol v. Beaumont* (1883), 50 L. T. 112.

Rebuttal of the Presumption.—This presumption may, however, be rebutted by the evidence of circumstances from which the court may infer that the extent of the highway is confined to a more limited area. Thus, where a ditch of a considerable depth and width separated a strip of land from the roadway, it was held that there was ample evidence to rebut the presumption (*f*).

It is a question of degree in each case whether or not there is a substantial piece of waste, and there is also the question whether the fences between the inclosed land and the waste were put up with any reference to the highway or whether they were put up for any other reason (*g*). The question also depends on such circumstances, for instance, as the nature of the district through which the road passes, the width of the margins, the regularity of the line of the hedges and the levels of the lands adjoining the road (*h*).

Nature of a Highway.—It is convenient to mention a few points with regard to the nature of a highway which may assist the reader in the perusal of the following pages.

A highway is merely a public right of way (*i*). It is really a public easement. Neither the public, nor the Crown on behalf of the public, has any proprietary right in the soil over which the highway exists (*k*). It is often said that highways are “vested” in particular bodies, and this term is sanctioned by use in statutes (*l*). But the term amounts to little more than this, that powers and

(*f*) *Neeld v. Hendon Urban District Council* (1899), 81 L. T. 406.

(*g*) *Ibid.*, at p. 407 (*per* CHANNELL, J.).

(*h*) *Ibid.*, at p. 408 (*per* LORD RUSSELL OF KILLOWEN).

(*i*) *Harrison v. Rutland (Duke)*, [1893] 1 Q. B. 142, at p. 150.

(*k*) 1 Rolle, Abr. 392, B. pl. 1, 2; *Goodtitle v. Alker*, 1 Burr. 133, at p. 143; *Harrison v. Rutland (Duke)*, *supra*, at p. 155.

(*l*) See *e.g.*, the Public Health Act, 1875, s. 149.

duties are given and imposed upon bodies for the purpose of maintaining the surface of the land in a state suitable for the exercise of the right of passage (*m*).

As to the manner in which a highway may be created, such a creation may be effected by statute or by dedication.

The dedication of a highway is the gift or grant to the public of the public easement, by the owner of the soil. Dedication may be actual, or presumed from user by the public without interference by the owner of the soil (*n*).

Although every member of the public may use a highway, the rightful mode of user may be qualified. Thus, there may be a highway by foot only (*o*).

Presumption as to the Ownership of the Soil of Highways.—Where a road forms the boundary between two estates, there is a *prima facie* presumption that the soil of the road, *usque ad medium filum viæ*, belongs to the adjoining owners (*p*). This presumption is allowed to prevail upon grounds of public convenience, and to prevent disputes as to the precise boundaries of property. It is based on the supposition that, when the road was originally formed, each of the proprietors on either side contributed

(*m*) See *Tunbridge Wells Corporation v. Baird*, [1896] A. C. 434, at p. 437; *Att.-Gen. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301, at p. 311.

(*n*) *Greenwich Board of Works v. Maudslay* (1870), L. R. 5 Q. B. at p. 404.

(*o*) *Poole v. Huskinson* (1843), 11 M. & W. 827, at p. 830.

(*p*) *Doe v. Pearsey* (1827), 7 B. & C. 304; 9 D. & R. 908; *Goodtitle v. Alker* (1757), 1 Burr. 133; *Stevens v. Whistler* (1809), 11 East, 51; *R. v. Matthias* (1861), 2 F. & F. 570; 2 Jur. 13; *Hodges v. Lawrence* (1854), 18 J. P. 347; *In re White's Charities*, [1898] 1 Ch. 659; *Harrison v. Rutland (Duke)*, [1893] 1 Q. B. 142, at p. 155; *Mappin Bros. v. Liberty & Co., Limited*, [1903] 1 Ch. 118; *Beckett v. Leeds Corporation* (1871), L. R. 7 Ch. App. 421. See also *Central London Rail. Co. v. City of London Land Tax Commissioners*, [1911] 2 Ch. 467; *Thompson v. Hickman*, [1907] 1 Ch. 550; *London and North Western Rail. Co. v. Westminster Corporation*, [1902] 1 Ch. 269; [1905] A. C. 426.

a portion of his own land for the purpose of the roads (*q*). This presumption applies whether the lands be of freehold, copyhold or leasehold tenure (*r*). It applies also to streets in a town (*s*). There is no presumption that a highway was made before the time of legal memory, so as to vest the soil of it in the lord of the manor (*t*).

Conveyance of Land adjoining a Highway.—A conveyance of land described as abutting on a road will, in general, be presumed to have been intended to pass a moiety of the soil of the road, unless there be something in the context to exclude that construction (*u*). Admeasurements of the land, even when accompanied by a reference to a coloured plan in which no part of the road is included, have been held insufficient to rebut the presumption that a moiety of the road was intended to be conveyed (*x*). Nor is the presumption rebutted by the occurrence of circumstances which subsequently show it to be very injurious to the grantor (*y*).

(*q*) *Holmes v. Bellingham*, 7 C. B. (N.S.) 329; 29 L. J. C. B. 132; *Doe v. Pearsey* (1827), 7 B. & C. 304, at p. 309 (*per* LITTLEDALE, J.).

(*r*) *Tilbury v. Silva* (1890), 45 Ch. D. 98.

(*s*) See *Mappin Bros. v. Liberty & Co., Limited*, [1903] 1 Ch. 118; *In re White's Charities*, [1898] 1 Ch. 659; *London and North Western Rail. Co. v. Westminster Corporation*, [1902] 1 Ch. 269; [1905] A. C. 426. Cf. *Beckett v. Leeds Corporation* (1871), L. R. 7 Ch. App. 421.

(*t*) *Doe v. Pearsey*, 7 B. & C. 304; 9 D. & R. 908; *Cooke v. Green*, 11 Price, 736; *Scoones v. Morrell*, 1 Beav. 251.

(*u*) *Simpson v. Deady* (1860), 8 C. B. (N.S.) 433; *Berridge v. Ward* (1861), 10 C. B. (N.S.) 400; 30 L. J. C. P. 218; *Salisbury v. Great Northern Rail. Co.* (1858), 5 C. B. (N.S.) 174; *In re White's Charities*, [1898] 1 Ch. 659. And see generally, the cases cited in note (*p*), p. 179, *ante*.

(*x*) *Berridge v. Ward*, *supra*; *Dwyer v. Rich* (1871), Ir. R. 6 C. L. 144, at p. 149.

(*y*) *Micklethwait v. Newlay Bridge Co.* (1886), 33 Ch. D. 133, at p. 145. The presumption of ownership *ad medium filum viæ* does not apply to the case of a conveyance of land abutting on a railway. See *Thompson v. Hickman*, [1907] 1 Ch. 550.

Ownership of the Soil of a Private Way.—The same principles apply in the case of a private way which divides two adjoining properties (z). But as a rule there is evidence in such a case of the ownership of the soil over which the right is exercised. The mere fact, however, that a private road leads to the lands of one only of the two adjoining proprietors is not *per se* sufficient to rebut the presumption of law, for it is no evidence that the soil of the road is vested in the proprietor to whose land it exclusively leads (a).

Rebuttal of the Presumption.—The presumption of ownership *ad medium filum viæ* was held to be rebutted by the following combination of circumstances, any one of which standing alone would possibly not have sufficed : (1) the land conveyed adjoining the highway was distinguished on the plan by a distinct number, and the highway had also its own distinct number ; (2) there were trees on the land conveyed, and also trees on the highway, and the valuation of the timber extended only to the trees on the land, and not to the trees on the highway ; and (3) the acreage and the colouring on the plan excluded the highway (b).

Again, the presumption was held to be rebutted in *Beckett v. Leeds Corporation* (c), by proof of acts of ownership. In that case the title to the soil of an ancient street in Leeds was in dispute. It was claimed, on the one hand, that the soil of the street was in the lord of the manor, and on the other hand that it was in the owners of the adjoining houses by virtue of the presumption. It was held that the receipt by the lords of the

(z) *Holmes v. Bellingham* (1859), 29 L. J. C. P. 132 ; *Noye v. Reed*, 1 M. & Ry. 65.

(a) *Smith v. Howden* (1863), 14 C. B. (N.S.) 398.

(b) *Pryor v. Petre*, [1894] 2 Ch. 11. See also *Duke of Devonshire v. Pattinson* (1887), 20 Q. B. D. 263 ; *Micklethwait v. Newlay Bridge Co.* (1886), 33 Ch. D. 133.

(c) (1872), L. R. 7 Ch. App. 421.

manor of annual payments in respect of pipes laid in the soil of the highway since the grant of the adjoining houses, and the granting of liberty by the lords to make encroachments on the highway was sufficient to rebut the presumption (*d*).

Presumption as to Ownership of Wayside Strips.—

As a necessary corollary to the last-mentioned presumption, there is a presumption that wayside strips belong to the owners of the adjoining inclosures. Thus, where between fences on either side of a highway there are intervening strips of waste land, there is a presumption that the strip on the one side of the highway belongs to the owner of the inclosure on that side of the highway, and that the owner of the strip on the other side of the highway is the owner of the inclosure on the other side of the highway (*e*).

This presumption does not apply where the strips are connected or adjoin to a common or wide piece of waste land (*f*). For in the latter case they will be presumed to be part of the waste of the lord (*g*).

It has been said, that the presumption, that waste lands adjoining a public highway and the soil of the highway itself *ad medium filum viæ*, belong to the adjoining owners, does not apply to persons claiming under the same grantor, in the event of the true title appearing, as occurs where the adjoining properties have both been derived from one and the same original owner; therefore, where the lord of the manor has conveyed land to one, and afterwards other land to another, if it appears that a narrow strip of land passes by one or other of the conveyances, but it is

(*d*) See also *Leigh v. Jack* (1879), 5 Ex. D. 264; *Plumstead Board of Works v. British Land Co.* (1874), L. R. 10 Q. B. 16; reversed on other grounds (1875), L. R. 10 Q. B. 203.

(*e*) *Smith v. Dendy* (1860), 8 C. B. (N.S.) 433, at pp. 469, 470; *Doe d. Pring v. Pearsey* (1827), 7 B. & C. 304, at pp. 307, 308.

(*f*) *Grose v. West* (1816), 7 Taunt. 39, at p. 41.

(*g*) *Grose v. West*, *supra*, at p. 41.

doubtful by which, no presumption in favour of the former as against the latter arises from the fact that the strip of ground lies between a highway and land indisputably in the former's conveyance (*h*).

Rebuttal of the Presumption as to the Ownership of Wayside Strips.—The presumption may be rebutted by evidence showing conclusively that the ownership of the soil of the highway or of the waste lands is in the lord of the manor, or in some other proprietors, the point to be ascertained, in all cases, being whether the grantee of the lord inclosed to the edge of his grant, or left an intervening space between his inclosure and the boundary line of his property. If he inclosed to less than the whole extent of his grant, leaving a space next to the road, that intervening space will belong to him, but, if he inclosed to the full extent of his grant, the intervening space will belong to the lord. The presumption, however, being *primâ facie* in favour of the grantee of the adjoining land, the lord must show acts of ownership to support his claim if he claims the intervening space (*i*), and in support of his title and claim he may give evidence not only of acts of ownership exercised over the intervening space or spot in dispute, but also of acts of ownership exercised over other parts of the waste lands of the manor, provided that these other parts shall be situated relatively to the intervening space or plot in dispute in such manner as that they and it can fairly be considered parts of the same waste or common (*k*). But evidence of user by the grantee and by those claiming under him will be allowed

(*h*) *White v. Hill* (1844), 6 Q. B. 487; *Salisbury v. Great Northern Rail. Co.* (1858), 5 C. B. (N.S.) 174.

(*i*) See *Doe d. Barrett v. Kemp* (1831), 7 Bing. 332; *Tutill v. West Ham Local Board* (1873), L. R. 8 C. P. 447.

(*k*) See *Doe d. Barrett v. Kemp* (1835), 2 Bing. N. C. 102; *Headlam v. Hedley* (1816), Holt N. P. 463; *Doe d. Harrison v. Hampson* (1847), 4 C. B. 267; *Stanley v. White* (1811), 14 East, 332; *Hollis v. Goldfinch* (1823), 1 B. & C. 205; *Grose v. West* (1816), 7 Taunt. 39.

to outweigh the presumption in favour of the lord which arises from acts of ownership by the lord on other parts of the wastes of the manor (*l*).

It may happen that the soil of the highway is not vested either in the lord of the manor as such, or in the adjoining landowners, as, for instance, where the pasturage and soil of the highway are vested in the churchwardens and overseers of the parish as trustees for the parish (*m*).

No Presumption with regard to the Ownership of "Balks."—As regards "balks" or strips of land occasionally found to lie between the lands of private proprietors it would appear that there is no presumption of ownership in favour of either of the adjoining owners (*n*), and the title thereto must accordingly be shown when either of them claims the balk. Balks do not, in English law, belong to the public, as did the *methoria* of the civil law (*o*).

SECTION 2.—RELATIONSHIP BETWEEN OWNERSHIP AND THE REPAIR OF ROADS.

Suggested Explanation of the frequency of Roadside Strips.—The explanation of the frequent occurrence of strips of waste land between high roads and inclosures, and the exposition of the principles upon which the presumption that these strips belong to adjoining owners is founded, which were given by ABBOTT, C.J., in *Steel v. Prickett* (*p*), have long since been adopted as warranted in point of history and sound in point of law: "In remote and ancient times," said his lordship, "when roads were

(*l*) *Simpson v. Dendy* (1860), 8 C. B. (N.S.) 433; *Gery v. Redman* (1875), 1 Q. B. D. 161. See also *Plumley v. Lock* (1903), 19 T. L. R. 14.

(*m*) *Haigh v. West*, [1893] 2 Q. B. 19.

(*n*) *Godmanchester v. Phillips* (1836), 4 A. & E. 560.

(*o*) Colquhoun's Summary, s. 2179.

(*p*) 2 Stark. 463 469.

frequently made through uninclosed lands, and they were not formed with that exactness which the exigencies of society now require, it was part of the law that the public, where the road was out of repair, might pass along the land by the side of the road. This right on the part of the public was attended with this consequence, that although the parishioners were bound to the repair of the road, yet, if an owner excluded the public from using the adjoining land, he cast upon himself the onus of repairing the road. If the same person was the owner of the land on both sides, and inclosed on both sides, he was bound to repair the whole of the road ; if he inclosed on one side only, the other being left open, he was bound to repair to the middle of the road ; and where there was an ancient inclosure on one side, and the owner of lands inclosed on the other, he became bound to repair the whole. Hence it followed, as a natural consequence, that when a person inclosed his land from the road, he did not make his fence close to the road, but left an open space at the side of the road, to be used by the public when occasion required. This appears to be the most natural and satisfactory mode of explaining the frequency of wastes left at the sides of roads ; the object was to have a sufficiency of land by the side of a road when it was out of repair."

This further consequence would also appear to have followed where a person inclosed his land up to a highway so as to deprive the public of their right of travelling on the adjoining strips of waste land when the road itself became unfit for use, and where he neglected to keep the road in repair, that those lawfully using the highway might make gaps in the hedges and pass along on his inclosure, so long as they did not ride further into it than was needful for avoiding the bad way (q).

(q) *Henn's Case*, Sir W. Jones, 297 ; *Duncombe's Case*, 1 Rolle, Abr. 390 ; Cro. Car. 366 ; 2 Ld. Raym. 1170. Cf., however, *Arnold v. Blake* (1871), L. R. 6 Q. B. 433 ; *Arnold v. Holbrook* (1873), L. R. 8 Q. B. 96 ; *Mercer v. Woodgate* (1869), L. R. 5 Q. B. 26.

Right to Deviate in the Case of a Private Way.—These principles, however, do not apply in the case of a private road, because the person using the way ought himself to keep it in repair (*r*). As a general rule the grantor of the way gives the grantee a right over a particular line of road only, and no liberty to break out of it over the whole surface of his close (*s*). If, however, the grantor of a private right of way obstruct the way, the grantee may deviate over other lands of the grantor (*t*).

Inclosure Roads.—An owner whose land adjoins an inclosure made by virtue of a special Act of Parliament for inclosing and dividing common fields, will not, unless so directed by the Act, be liable either to make or to keep in repair the road skirting or crossing his inclosure (*u*).

An adjoining owner will not be liable for inclosing up to a modern highway, where, from the circumstances of the origin of the road and the nature of the property, the dedication of the land for a road and public highway may reasonably be presumed to have been to the extent of the road only as laid out, excluding any right to go on the land adjoining; and this is more especially so, where streets and roads are laid out over building land (*x*).

A landowner who is bound in respect of his inclosure to repair a highway, is freed from his liability in the event of his laying open the inclosure as it was before (*y*).

(*r*) *Taylor v. Whitehead* (1781), 2 Doug. 749; *Pomfret v. Ricroft* (1669), 1 Saund. 322 a; Com. Dig. chimin. (D. 6).

(*s*) *Taylor v. Whitehead*, *supra*; *Bullard v. Harrison* (1815), 4 M. & S. 387; *Absor v. French*, 2 Shower, 28; Styles, 364. See generally, *Arnold v. Holbrook* (1873), L. R. 8 Q. B. 96; *Mercer v. Woodygate*, L. R. 5 Q. B. 26; *Arnold v. Blake* (1871), L. R. 6 Q. B. 433; *St. Mary, Newington v. Jacobs* (1871), L. R. 7 Q. B. 47.

(*t*) *Selby v. Nettleford* (1873), 9 Ch. App. 111.

(*u*) *R. v. Flecknow*, 1 Burr. 461; *Ex parte Vennor*, 3 Atk. 772; *R. v. Ramsden*, E. B. & E. 949, 957. See also p. 195, *post*.

(*x*) *R. v. Ramsden*, E. B. & E. 949, 957; *Beckett v. Corporation of Leeds*, L. R. 7 Ch. 421; and *Leigh v. Jack*, 5 Ex. D. 264.

(*y*) *Hawkins*, P. C. bk. 1, c. 76, § 7; *R. v. Skinner*, 5 Esp. 219; 2 Wms. Saund. 160 a; Bacon's Abr. Highways, E.

On the other hand, if, under the provisions of the Highway Acts, the highway is widened, turned, or diverted, he will become liable to contribute towards the repairs of the new road (z).

Statutory Power of Making Temporary Roads pending Repairs, etc.—By the Highway Act, 1835 (a), the surveyor is empowered, whilst the highway is being widened or repaired, to make a temporary road through the adjoining grounds ; and compensation is, in such case, to be allowed to the parties injured.

Erection of Fences by Landowners on Highways.—The Highway Act, 1862 (b), provides that no person, through whose land a highway repaired by the parish passes, shall become liable for the repair of such highway by reason merely of his erecting fences between the highway and the adjoining land, provided the fences are erected with the consent in writing of the highway board of the district within which the highway is situate, or with the consent of the surveyor or other authority having jurisdiction over the highway.

The parish or some defined district is *primâ facie* liable for the repairs of the highways within it ; but it may show an exemption from such liability.

Repair of "Main Roads."—By the Local Government Act, 1888 (c), it was provided that every main road within a county, if repairable by the highway authority, became repairable by the county council,—the council having for this purpose all the powers and being subject to all the liabilities of the highway board ; but the Act gave to any urban authority the option of retaining its main roads within its own power, in which case it was

(z) 5 & 6 Will. 4, c. 50, ss. 92, 93.

(a) *Ibid.*, s. 25.

(b) 25 & 26 Vict. c. 61, s. 46.

(c) 51 & 52 Vict. c. 41.

provided that the urban authority should receive from the council a contribution towards the repairs of these roads (*d*). The Act vested all main roads, not so retained by the urban authority, in the county council, which body has all the powers of a highway board for preventing and removing obstructions on the road, and for asserting the right of the public to the use and enjoyment of the roadside wastes (*e*). The Act provides that none of these provisions shall alter the liability of any person or body of persons corporate or unincorporate (not being a highway authority) to maintain and repair any road or part of a road (*f*).

The rural district council is now the highway authority of the district (*g*).

It is the duty of every district council (whether urban or rural) to protect all public rights of way, and prevent as far as possible, the stopping or obstruction of any such right of way, whether within its district or in an adjoining district in the county or counties in which the district is situate, where the stoppage or obstruction thereof would, in the opinion of the council, be prejudicial to the interests of that district, and to prevent any unlawful encroachment on any roadside waste within that district (*h*).

Liability for Repair Ratione Tenuræ and Ratione Clausuræ.—Liability for repair of a highway by reason of the tenure of land, or, as it is commonly called, liability *ratione tenuræ*, is a prescriptive liability attached to the ownership of a particular piece of land. It would appear to be in the nature of a feudal service. It has been said

(*d*) *Ibid.*, s. 11 (1).

(*e*) *Ibid.* Under these provisions the county council have given them a power of asserting the right of the public to the use and enjoyment of roadside wastes. See *Curtis v. Kesteven County Council* (1890), 45 Ch. D. 504.

(*f*) 51 & 52 Vict. c. 41, s. 97.

(*g*) 56 & 57 Vict. c. 73, s. 25.

(*h*) *Ibid.*, s. 26 (1).

that unless the liability arose from a grant by the Crown, it must have had its origin in a grant prior to the statute *Quia Emptores* (*i*). This much seems clear—that it is essentially a matter for immemorial prescription, and that if it can be shown to have originated, in any particular case, at a time within legal memory, the prescription will fail (*k*).

Liability for repairs of a highway by reason of inclosure, or, as it is commonly called, liability *ratione clausulæ*, arises where the owner of land adjoining a highway has so inclosed his land as to prevent the public from exercising their right of deviating from the roadway; when the latter becomes impossible the owner may be liable *ratione tenuræ*, in which latter case he may, by grant or prescription, exact a *toll traverse* from all persons using the road (*l*). But the liability *ratione tenuræ*, when it exists, is only enforceable against the owner where he is also the occupier of the lands liable (*m*); moreover, the liability will be wholly discharged by a material alteration of the character or quality of the road (*n*).

Where, on the report of a competent surveyor, a highway repairable *ratione tenuræ*, appears not to be in proper repair, and the person liable to repair the same fails to place it in proper repair when requested so to do by a district council, such council itself may place the highway in proper repair and recover from the person liable to repair the highway the necessary expenses of so doing (*o*).

This remedy, however, is available only against the occupier of the land chargeable with the obligation, the

(*i*) 18 Edw. 1, c. 1.

(*k*) As to prescription generally, see pp. 20 *et seq.*, *ante*.

(*l*) 3 Steph. Black. (14th ed.), p. 53.

(*m*) *R. v. Barker*, 25 Q. B. D. 213. The liability to repair a highway *ratione tenuræ*, does not, of itself, found and give rise to an exemption from the payment of highway rates (*Ferrand v. Bingley District Council*, 19 T. L. R. 592).

(*n*) *R. v. Barker*, 25 Q. B. D. 213; *Heath v. Weaverham Township*, [1894] 2 Q. B. 108.

(*o*) 56 & 57 Vict. c. 73, s. 25 (2).

owner of such land not being liable to repay sums so expended, and the public not being in any way concerned with a possible right of an occupier to be reimbursed sums he has expended in repairs (*p*).

SECTION 3.—PREVENTION OF ENCROACHMENTS ON HIGHWAYS.

Statutory Provisions with regard to the Prevention of Encroachments upon Highways.—The Highway Act, 1835, contains divers provisions for the prevention of encroachments upon highways. The Act defines the centre of the highway, and then proceeds in effect to prohibit encroachments within a prescribed distance of the centre of the highway.

The section defining the centre of the highway is as follows: “Where in this Act any matter or thing is directed or forbidden to be done within a certain distance of the centre of the highway, that portion of ground shall be deemed and be taken to be the highway which has been maintained by the surveyor as highway, and repaired with stones or other materials used in forming highways, for the six months immediately preceding; and the centre of the highway shall be the middle of such highway, where, a line being drawn along the highway or a point marked, an equal number of feet of highway which have been so maintained and repaired as aforesaid for twelve months before shall be found on each side of such line or mark” (*q*).

The Act also contained provisions to the effect that no tree, shrub, or bush should thereafter be planted on any carriageway or cartway, or within fifteen feet from the

(*p*) *Cuckfield District Council v. Goring*, [1898] 1 Q. B. 865; 67 L. J. Q. B. 539. See also *Baker v. Greenhill*, 3 Q. B. 148.

The legal origin of an obligation to repair *ratione tenuræ*, may be a grant from the Crown (*Dittons Urban Council v. Marks*, 71 L. J. K. B. 309).

(*q*) 5 & 6 Will. 4, c. 50, s. 63.

centre thereof, and that if planted the same were so within that distance, they might be compulsorily removed (*r*).

Protection of Highways from the prejudicial effect of neighbouring Trees and Hedges.—The Act (*r*) contains elaborate provisions calculated to protect highways from obstruction by overhanging branches or protruding hedgerows, and from the prejudicial effect of the proximity of trees and hedges. Section 65 provides in effect that if the surveyor shall think that any carriageway or cartway is prejudiced by the shade of any hedges, or by any trees (except trees planted for ornament or shelter) (*s*), growing in or near hedges or other fences, and that the sun and wind are excluded from such highway, to the damage thereof, or if any obstruction is caused in any carriageway or cartway by any hedge or tree, the owner (*t*) of the land on which such hedges or trees are growing may be summoned before the justices at the special sessions for the highways, and the justices may order the trees to be cut, pruned, or lopped (*u*) in such a manner that the carriageway or cartway shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded, and the obstruction removed. If the owner make default in removing the offending trees, boughs or hedge he incurs a penalty; and the surveyor is thereupon required to cut the same and to remove the obstruction, the expenses incurred and penalties imposed being made recoverable as in the Act directed (*x*). There are divers provisions in the several statutes relating to

(*r*) 5 & 6 Will. 4, c. 50, s. 64.

(*s*) *Frampton v. Tiffin*, 2 Jur. 986.

(*t*) "Owner" includes "occupier." See *Woodard v. Billericay Highway Board* (1879), 11 Ch. D. 214.

(*u*) The tops of the trees must not be cut off (*Unwin v. Hanson*, [1891] 2 Q. B. 115).

(*x*) See *Jenney v. Brook* (1844), 6 Q. B. 323; *Brook v. Jenney*, 2 Q. B. 265; *Walker v. Horner* (1875), 1 Q. B. D. 4; *Woodard v. Billericay Highway Board* (1879), 11 Ch. D. 214.

highways aimed at the prevention of encroachments on highways by persons building or erecting fences and other works upon highways. The main provisions are contained in the Highway Act, 1835. Section 69 of that Act provides that if any person encroach by making or causing to be made any building, hedge, ditch, or other fence, on any carriageway or cartway, within the distance of fifteen feet from the centre, he shall forfeit, on conviction, for every offence any sum not exceeding forty shillings; and the surveyor is required to cause the said building, hedge, ditch or fence to be taken down or filled up at the expense of the person to whom it shall belong; and the justices at sessions, upon proof to them made upon oath, may levy as well the expense of taking down the said building, hedge, or fence, or filling up the ditch, as the several and respective penalties imposed by the Act, by distress and sale of the offender's goods as therein mentioned.

With regard to this section it was held that the encroachment must be *on* the road as well as *within* fifteen feet from the centre of the road. Thus, where the road was only nine feet wide, and a fence, which was erected on some waste land, was within fifteen feet of the centre of the road, but not *on* the road, it was held that the surveyor had no right to pull it down (*y*). Again, it was also held upon the construction of this section that the highway must be a highway which has been repaired with stones, etc., for six months immediately preceding (*a*).

To obviate the inconvenience arising from the last mentioned decisions the Highway Act, 1864 (*b*), provided in effect that persons making encroachments on highways should be subject to the penalties mentioned in the Highway Act, 1835 (*c*), although the whole space

(*y*) *Evans v. Oakley* (1843), 1 C. & K. 125. See also *Field v. Thorne*, 20 L. T. (N.S.) 563; *Lowen v. Kaye*, 4 B. & C. 3; *Keane v. Reynolds*, 2 E. & B. 748; 18 Jur. 242; *R. v. Lepille*, 15 W. R. 45.

(*a*) *Chapman v. Robinson*, 1 E. & E. 25; 5 Jur. (N.S.) 434.

(*b*) 27 & 28 Vict. c. 101, s. 51.

(*c*) 5 & 6 Will. 4, c. 50.

of fifteen feet from the centre of the carriageway or cartway has not been maintained with stones or other materials used in forming highways (*d*) ; and further, that where any carriageway or cartway is fenced on both sides, no encroachment as aforesaid shall be allowed, whereby such carriageway or cartway shall be reduced in width to less than thirty feet between the fences on both sides (*e*).

Here it should be mentioned that the common notion that the owners of land on the sides of a highway may encroach or inclose up to within fifteen feet of the centre of the road, is an error ; for, if an encroachment be made upon a highway, although not within fifteen feet of the centre and although upon a part not commonly used by the public, the person making the encroachment may be indicted for a nuisance (*f*).

Statutory Provisions with regard to the Width of Highways.—The Highway Act, 1835 (*g*), provides that the surveyor must make, support, and maintain every public cartway leading to any market-town twenty feet wide at the least, and every public horseway eight feet wide at the least ; and he is also required to support and maintain every existing public footway by the side of any carriageway or cartway three feet at the least,—if the ground between the fences will admit of it (*h*). The surveyor, however, must not, in purported exercise of his duties mentioned above, encroach on the bank adjoining the road, for the removal of the smallest portion of the soil is an injury to the land, and it tends to alter the evidence of title (*i*).

(*d*) See *Easton v. Richmond Highway Board* (1871), L. R. 7 Q. B. 69.

(*e*) See *Coggins v. Bennett* (1877), 2 C. P. D. 568.

(*f*) *R. v. Johnson* (1859), 1 F. & F. 657 ; *R. v. Wright* (1832), 3 B. & Ad. 681 ; *R. v. United Kingdom Telegraph Co.* (1862), 31 L. J. M. C. 166.

(*g*) 5 & 6 Will. 4, c. 50.

(*h*) *Ibid.*

(*i*) *Alston v. Scales* (1832), 9 Bing. 3 ; 2 Moo. & S. 5.

The justices of the peace, where the highway is not of sufficient breadth, and might be widened and enlarged, are empowered by s. 82 of the Highway Act, 1835 (*k*), to order such highway, within their respective divisions, to be widened and enlarged, in such manner as they shall think fit, so long as the highway, when widened and enlarged, does not exceed thirty feet in breadth; but these powers do not extend to allow the pulling down of any house or building, or the carrying away of the ground of any garden, lawn, yard, court, park, paddock, planted walk, plantation, or avenue to any house, or any inclosed ground set apart for building ground or as a nursery for trees; and the property in mines and timber is reserved to the owners of the ground taken for widening the highway.

Provision was made by s. 24 of the same Act (*l*) for the setting up of direction posts, and of stones or posts to mark the boundaries of the highway (*m*).

The foregoing duties and powers of the surveyor under the Highway Act, 1835, have now devolved in general upon the highway authority for the district (*n*).

Barbed Wire in Fences adjoining Highways.—The Barbed Wire Act, 1893 (*o*), provides that where there is on any land adjoining a highway within the county or district of a local authority a fence made of barbed wire (*p*), or in or on which barbed wire has been placed, and such barbed wire is a nuisance to such highway (*q*), it

(*k*) 5 & 6 Will. 4, c. 50.

(*l*) 5 & 6 Will. 4, c. 50.

(*m*) This power is now vested in the district council. See the Local Government Act, 1894, s. 25 (1).

(*n*) See 25 & 26 Vict. c. 61; 38 & 39 Vict. c. 55; and the Local Government Acts, 1888 and 1894.

(*o*) 56 & 57 Vict. c. 32.

(*p*) The expression "barbed wire" is defined by the Act as meaning any wire with spikes or jagged projections.

(*q*) The expression "nuisance to a highway" as applied to barbed wire in the Act is defined as any barbed wire which may probably be injurious to persons or animals lawfully using the highway.

shall be lawful for such local authority to serve notice in writing upon the occupier of such land requiring him within a time stated (not less than one month nor more than six months after the date of the notice) to abate such nuisance. It further provides that if the occupier fails to comply with the notice, the local authority may apply to a court of summary jurisdiction, which court if satisfied that the wire is a nuisance may by summary order direct the occupier to abate such nuisance, and if the occupier fails to comply with the order within a reasonable time the local authority may do whatever may be necessary in execution of the order, and may recover in a summary manner the expenses incurred in connection therewith.

Apart from this Act, it may be observed that the placing of dangerous spikes on a fence adjoining a highway may constitute a nuisance and render the owner liable upon that ground (*r*).

SECTION 4.—INCLOSURE ROADS.

New Roads Set out and Made under the Inclosure Acts. — By the Inclosure Act, 1845 (*s*), the valuer, before proceeding to make any division and allotment of the land to be inclosed, was directed to set out and make new public roads and ways, and to widen, or else stop up (*t*), the existing or old ones, and the soil of the old roads which shall be stopped up was to be considered as land subject to be inclosed ; but as regards turnpike roads, the consent of a majority of the turnpike trustees to be given at a public meeting duly called for the purpose, was required to any alteration made by the valuer. The Act also provided that every carriage road so set out should be fenced well and sufficiently on both sides thereof by such persons, interested in the lands to be inclosed, and

(*r*) *Fenna v. Clare*, [1895] 1 Q. B. 199.

(*s*) 8 & 9 Vict. c. 118, s. 62.

(*t*) See *Turner v. Crush* (1878), 3 Ex. D. 303 ; 4 App. Cas. 221 ; *Hornby v. Silvester* (1888), 20 Q. B. D. 797.

within such time, as the valuer should direct (*u*) ; but, in the absence of any direction by the valuer, no duty to fence was imposed either upon the owner or upon the occupier (*x*), and the fencing might in certain cases be dispensed with altogether (*y*). It was further provided that the grass and herbage on the sides of private roads should belong to such persons interested in the lands to be inclosed as the valuer should direct ; and, in the absence of such direction, it was provided that the grass and herbage should belong to the proprietors on either side of the road (*z*).

No Presumption of Ownership *Usque ad Medium Filum Viæ* in the Case of Inclosure Roads.—The legal presumption that the soil of a highway belongs to the adjoining proprietors *usque ad medium filum viæ* (*a*) is not applicable to roads set out and for the first time defined under the General Inclosure Act (*b*) ; but the soil of a road set out over the wastes of a manor remains, throughout its whole width, in the lord of the manor, that portion only of the soil being taken from him, for which he receives compensation and which is allotted to others (*c*).

Fencing of Allotments under Inclosure Acts.—The Inclosure Act, 1845, required that all allotments made under that Act should be inclosed, ditched, and fenced at the expense of the respective persons, to whom the same should be allotted, in such manner and within such time as the valuer should direct ; and the fences were ever afterwards to be maintained and repaired by

(*u*) 8 & 9 Vict. c. 118, s. 65.

(*x*) *Potter v. Parry* (1859), 7 W. R. 182.

(*y*) 17 & 18 Vict. c. 97, s. 9.

(*z*) 8 & 9 Vict. c. 118, s. 68.

(*a*) As to this presumption, see p. 179, *ante*.

(*b*) *R. v. Edmonton* (1831), 1 Moo. & R. 32 ; *R. v. Hatfield* (1835), 4 A. & E. 164 ; *Davison v. Gill* (1800), 1 East, 64.

(*c*) *Poole v. Huskinson* (1843), 11 M. & W. 830.

the allottees. Also, where portion of a common to be inclosed was set out as a regulated pasture, the same was to be fenced off from the residue of the common,—in such manner as the valuer should direct ; a duty was thereby imposed upon the valuer to set out and allot the respective stints or rights of pasturage among the parties in proportion to their rights in the common, such parties becoming the owners of the soil of their respective stints, but without the mines or minerals (*d*). Further, allotments made for the purpose of providing stone, gravel, etc., for the repair of roads were to be fenced as the valuer should direct (*e*).

(*d*) 8 & 9 Vict. c. 118, s. 113.

(*e*) *Ibid.*, s. 72.

CHAPTER X.

BOUNDARIES OF REGISTERED LAND.

Lord Westbury's Act of 1862.—The Land Registry Act of 1862 (*a*), commonly called Lord Westbury's Act, was, from a practical point of view, an Act for the registration of "indefeasible" titles only (*b*). After proof of title, there were very onerous steps to be taken for settling descriptions and the boundaries of the lands to be registered. The person applying for registration of title was required to furnish to the registrar, and the registrar was required to examine and settle, an exact description of the lands to be registered. A full and complete schedule or description of the property was also required to be made and deposited in the office of land registry, containing, besides the full particulars of the property, all the boundaries thereof, together with the names and addresses of all the owners and occupiers of the lands adjoining, and the name and address of the lord of the manor, if the lands were situate within or held of any manor (*b*). The identity of the lands with the parcels or descriptions contained in the title deeds was required to be fully established. The registrar had power, by such inquiries as he should think fit, to ascertain the accuracy of the descriptions, and the quantities and boundaries of the lands (*c*). For this purpose an official was usually sent to view the property itself, and to verify the boundaries, and to ascertain whether they were accurately defined. This

(*a*) 25 & 26 Vict. c. 53.

(*b*) *Ibid.*, s. 7.

(*c*) *Ibid.*, s. 10.

investigation and inquiry had to be conducted in the presence of the adjoining owners and occupiers. When the survey and investigation were complete a fair copy of the map as settled, with a terrier describing the property, was prepared for deposit in the office of land registry ; and, except in the case of incorporeal hereditaments, a map or plan was required to be made and deposited as part of the description of the property intended to be registered (*d*).

The description of the estate, as finally approved, with the map (if any) of the property, was required to be entered in the registry (*e*). If there was any disputed question of boundary between the applicant and any adjoining proprietor, which had not been previously determined, the parties, or either of them, might lodge an objection in writing to the determination of such question ; and if any such objection was lodged, the registrar was required to specify upon the record of title the existence of such disputed question of boundary, and the registration was made subject to this.

This Act was found to be a failure. In 1868 the Land Transfer Commission attributed the failure of the Act to two facts, one of which was that all boundaries had (in effect, under the Act) to be accurately defined and guaranteed, and that the expense of registration had in consequence become prohibitive.

In 1868 the Land Transfer Commission was appointed to inquire into the matter of registration. After divers abortive Bills, a Bill introduced by Lord Cairns became the Land Transfer Act, 1875 (*f*). One of the features relied upon to render this Act popular was that boundaries were to be treated substantially as they were treated in

(*d*) 25 & 26 Vict. c. 53, s. 10.

(*e*) *Ibid.*, s. 14. Registration was not continued under this Act after 1874.

(*f*) 38 & 39 Vict. c. 87.

ordinary conveyancing where descriptions of parcels are usually qualified by the expression "little more or less" (*g*).

The Land Transfer Act, 1875.—The Land Transfer Act, 1875 (*h*), provided that registered land should be described in such manner as the registrar should think best calculated to secure accuracy ; but that such description should not be conclusive as to the boundaries and extent of the registered land. The Act also provided that no alteration should be made in the registered description of land, except under the order of the court or by way of explanation ; but that this provision should not be construed to extend to registered dealings with registered land in separate parcels by the registered description, although such land was originally registered as one estate (*i*).

The Land Transfer Act, 1897.—The Land Transfer Act, 1897 (*k*), repealed the provisions of the Land Transfer Act, 1875, as regards boundaries, and enacted that "registered land shall be described in the prescribed manner by means of the Ordnance map, together with such further verbal particulars (if any) as the applicant for registration may desire, and the registrar, or the court, if the applicant prefers, may approve, regard being had to ready identification of parcels, correct descriptions of boundaries, and, as far as may be, uniformity of practice."

In pursuance of the powers bestowed by s. 111 of the Land Transfer Act, 1875, and s. 22 of the Land Transfer Act, 1897, certain rules have been made with regard to the mode of description of registered land. These are as follows : That the Ordnance map, on the largest scale

(*g*) See the Second and Final Report of the Royal Commission on the Land Transfer Acts, 1911, p. 9.

(*h*) 38 & 39 Vict. c. 87.

(*i*) *Ibid.*, s. 83 (5), (6). }

(*k*) 60 & 61 Vict. c. 65.

published, shall be the basis of all registered descriptions of land (*l*) ; that the boundaries of the land shall be shown by an edging of red colour, and that enlargements and explanatory notes may also be made where it is considered desirable to add them (*m*) ; that where for any reason a plan cannot in the opinion of the registrar be satisfactorily made at once, the registration may be completed provisionally without a filed plan—the property register defining the land as precisely as possible and the reference to the plan being omitted from the land certificate ; and that a plan shall nevertheless be made as soon as practicable, and the property register shall then be altered accordingly and a corresponding alteration shall be made on the land certificate at the same time or on the earliest opportunity afterwards. We give the most important of the Land Transfer Rules, 1903, which relate to our subject, *in extenso*. They are as follows :

“ 272. If it is desired to indicate on the filed plan, or otherwise to define in the register, the precise position of the boundaries of the land or any parts thereof, notice shall be given to the owners and occupiers of the adjoining lands, in each instance, of the intention to ascertain and fix the boundary, with such plan, or tracing, or extract from the proposed verbal description of the land as may be necessary, to show clearly the fixed boundary proposed to be registered ; and any question of doubt or dispute arising therefrom shall be dealt with as provided by these Rules.

“ 273. When the position and description of the boundaries of the land have been thus ascertained and determined, the necessary particulars shall be added to the filed plan, and a note shall be made in the property register to the effect that the boundaries have been fixed. The plan shall then be deemed to define accurately the fixed boundaries.

“ 274. Except in cases in which it is noted in the property register that the boundaries have been fixed, the map shall be deemed to indicate the general boundaries only. In such cases the exact line of the boundary will be left undetermined, as for instance, whether it runs along the centre of a wall or fence, or its inner or outer face, or how far it runs within or beyond it ; or

whether or not the land registered includes the whole or any portion of an adjoining road or stream. When a general boundary only is desired to be entered in the register, notice to the owners of the adjoining lands need not be given. This Rule shall apply notwithstanding that part or the whole of a wall, fence, road, stream, or other boundary is expressly included in or excluded from the title or that it forms the whole of the land comprised in the title.

“275. Where, and so far as, physical boundaries or boundary marks do not exist, the fullest available particulars of the boundaries shall be added to the plan.

“276. A plan shall not be accepted for registration until it has been approved by an officer of the registry, or by such other person as the registrar shall authorise for the purpose.

“277. When the necessary plan cannot be prepared without a revision of the Ordnance map, the officers of the registry shall, if required by the applicant, make the necessary revision. In districts where registration of title is compulsory, the revision shall be made without charge.

“278. When an applicant desires to enter any verbal particulars or description of land on the register, they shall be submitted to the registrar for his approval. Such particulars shall contain a reference to the filed plan of the land, and shall be compared therewith by an officer of the registry.

“279. When such particulars consist of or refer to a detailed list by schedule or otherwise of separate portions of the land, each portion so detailed shall be distinguished, if possible, by a number or other reference in the list and on the filed plan.

“280. In districts where registration of title is compulsory, the registrar shall be furnished by the local authorities with particulars of alterations of names and numbers of streets and houses from time to time made, for future reference; and any correction of the register rendered necessary by such alterations may be made.

“281. Renewal, revision, or correction of plans and verbal descriptions of land, may be made at any time on the application in writing of the registered proprietor, upon the production of such evidence and the giving of such notices as the registrar may deem necessary.

“282. The registrar shall decide any question arising on a conflict between the verbal particulars and the plan, but the plan shall prevail unless he otherwise directs. On such a decision being given, the particulars and plan shall be altered accordingly.”

If we take Rule 272 cited above in its literal sense, it appears to give the registrar *quasi*-judicial functions for ascertaining and fixing boundaries. If the boundary is in doubt, it is difficult to see how the fixing of the true boundary can be effected without adjudicating upon the respective titles of the adjoining owners. It seems very doubtful whether the Land Transfer Acts can be construed in such a manner as to make this rule *inter vires*. It is not, perhaps, surprising to find that the Royal Commission on the Land Transfer Acts have recommended the repeal of s. 14 (2) of the Land Transfer Act, 1897, on which these Rules are based (*n*).

(*n*) The Second and Final Report of the Royal Commissioners on the Land Transfer Acts, 1911, p. 44. The recommendations of the Commissioners will no doubt lead in due course to legislation. It is interesting to note that the whole tendency of their recommendations as regards boundaries (see p. 44 of the report) is against creating the artificial difficulties which would appear to have been caused by the Rules mentioned in the text.

CHAPTER XI.

BOUNDARY TREES.

SECT.	PAGE
1.— <i>Ownership of Boundary Trees</i>	204
2.— <i>Remedies for Injuries arising from Overhanging Branches or Projecting Roots</i>	209
3.— <i>Ownership of Branches and Fruit fallen on Adjoining Lands</i>	214

SECTION 1.—OWNERSHIP OF BOUNDARY TREES.

General Rules as to the Ownership of Boundary Trees.—The ownership of a tree standing or growing upon the boundary of the properties of two adjoining owners depends upon the question who planted or sowed the tree. The tree belongs to the owner in whose ground the tree was first sown or planted (*a*). If the roots subsequently spread to the adjoining land that will not affect the ownership (*b*). Where it is not known who planted the tree the ownership will depend upon the situation of the body of the tree (*c*). If the tree is situate equally between the two properties, in the absence of evidence of ownership to the contrary, the tree will be presumed to belong to both adjoining owners as tenants in common (*d*).

State of the Authorities.—The authorities upon the law with regard to the ownership of boundary trees are not, perhaps, so lucid as might be desired.

(*a*) *Holder v. Coates* (1827), M. & M. 112, *per* LITLEDALE, J.

(*b*) *Lemmon v. Webb*, [1894] 3 Ch. 1, at p. 20.

(*c*) See *Holder v. Coates*, *supra*.

(*d*) *Masters v. Pollie* (1620), 2 Rolle, 141; *Anon. Case*, 2 Rolle, 255; *Lemmon v. Webb*, [1894] 3 Ch. 1, at p. 20.

The case of *Masters v. Pollie* (*e*) was an action of trespass for breaking into the plaintiff's close and taking away his boards. The defendant justified on the ground that there had been a great tree which grew between the close of the plaintiff and that of the defendant; and part of the roots of this tree had extended into the close of the defendant, so that the tree had been (in part) nourished by the defendant's soil, and the plaintiff had cut down the tree and carried it away into his own close and there sawed it into boards. Whereupon the defendant entered, took some of the boards, and carried them away, as he lawfully might do. Upon this the plaintiff demurred on the ground that, although some of the roots of the tree were in the defendant's soil, yet the body of the tree being in the plaintiff's land, the rest of the tree also belonged to the plaintiff. The demurrer apparently prevailed; and we are told that it was conceded by the whole court, that if the plaintiff had planted the tree in the soil of the defendant, it would have been otherwise. We are also told "*mes Mountague, C.J., dit que le plaintiff ne poyet limit le roots del' arbor, how far they shall grow and go.*"

The exact significance of the last remark is somewhat obscure. Although this case, as reported, appears to be an authority for the statement that the mere growth of roots into a neighbour's land does not of itself give that neighbour a right to the tree, a subsequent report of the same case throws great doubt upon the view of the case. From the subsequent report of the case (*f*) it would appear that the defendant, either originally or subsequently, claimed to follow the tree as a tenant in common, and that his failure lay, not in his failure to establish ownership of the tree, but in some technical reason whereby he was not entitled to follow the tree on to the lands where it had been taken.

(*e*) (1620), 2 Rolle, 141.

(*f*) 2 Rolle, 207.

The so-called *Anon. Case* in Rolle's Reports, which is in truth nothing more than a mere note, is frequently cited as the authority for the ownership in common of boundary trees. This case or note is as follows: If a tree grows in a hedge which divides the lands of A. and B., whereby the roots derive nourishment from the land of A. and also from the land of B., they are tenants in common of that tree, and this was adjudged (g).

It is conceived, and with this no doubt the reader will agree, that this case is indeed a mere note of the effect of the proceedings in *Masters v. Pollie*, and therefore that the true significance of the last-mentioned case is the confirmation of the rule (then probably well established), that a large tree must be taken when growing on a boundary to belong to the adjoining owners as tenants in common.

In *Waterman v. Soper* (h) HOLT, C.J., ruled that if A. plants a tree upon the *extreme limit* of his land, and the tree growing extend its roots into the land of B. next adjoining, A. and B. are tenants in common of the tree. But if all the root grows into the land of A., though the boughs overshadow the land of B., yet the branches follow the root and the property of the whole is in A.

In the case of *Holder v. Coates* (i) the body of the tree was in the defendant's land, but some of the roots grew into the land of the plaintiff. The defendant cut down the tree, and the plaintiff brought an action of trespass against him for so doing. LITTLEDALE, J., said that he could not see on what grounds the jury could find for either party in respect of the question which had been raised as to the proportion of nourishment derived by the tree from the soil of the plaintiff and the defendant respectively; but that the safest course would be to consider whether, from the evidence as to the situation of the trunk

(g) 2 Rolle, 255.

(h) (1697), 1 Ld. Raym. 737.

(i) (1827), Moo. & M. 112.

and of the roots, it could be ascertained where the tree was first sown or planted,—and to find for the plaintiff or for the defendant accordingly.

Conclusion.—The principles which may be reasonably deduced from the foregoing authorities have been stated at the commencement of this Chapter. We may, however, supplement that statement with the following observations: The true criterion as to ownership of a boundary tree lies in the question of fact, where was the tree first planted? If it can be ascertained as a fact that the tree was planted in one owner's land then the gradual growth of the trunk roots and branches resulting in an encroachment upon the neighbour's property does not affect the ownership of the tree. This appears to follow from the dicta of LITTLEDALE, J., in *Holder v. Coates* (k) cited above. On the other hand, if it cannot be so ascertained, inasmuch as the tree must belong to someone, yet neither owner can reasonably be preferred to the other, the only possible solution is to regard the tree as the common property of both, upon the not unreasonable presumption that when two owners have planted a tree exactly on the boundary, they intend the tree to continue the common property of them both. Finally, it is conceived that the situation of the trunk roots and branches is only material for finding the fact of the situation of the original planting.

No Easement for Roots and Branches.—It seems clear that no easement can be acquired entitling the alleged dominant owner to prevent the servient owner interfering with the roots and branches of the trees of the former which encroach upon or overhang the land of the latter. It is at any rate clear that there is an obvious objection to the prescriptive acquisition of such a right. As regards the roots, the enjoyment of the right would be secret and undisclosed, a kind of enjoyment which will not, as we have

(k) (1827), Moo. & M. 112.

seen (*l*), support a prescriptive claim. As regards the prescriptive acquisition of the right to overhanging branches, this point was dealt with in the case of *Lemmon v. Webb* (*m*).

“As regards the question whether the plaintiff has acquired any right,” said Lord HERSCHELL in that case (*n*), “by reason of the length of time these trees have overhung his neighbour’s soil, I think it is impossible to say that he has either acquired a right to the land over which they hang, or to their overhanging, under the Statute of Limitations. The trees, of course, grow from time to time, and their state each year is different from what it was the year before. The same remark applies to the suggestion that a prescriptive right has been obtained. The tree of to-day is not in the condition in which it was twenty years ago. It would be idle to suggest that the right gained at any time was the right to have the tree there in the condition in which it was twenty years before, and that it was only open to the adjoining owner to put back the tree into the condition in which it then was. The removal of what had grown in the meanwhile would, of course, be almost always, if not always, completely destructive of the tree. It seems to me impossible to say, in a case of this description, that a right is gained either by the Statute of Limitations or under the ordinary law of prescription.”

When we consider the multifarious forms which easements may take (*o*), and the indulgence extended to landowners in their enjoyment of accommodations which they and their predecessors in title have long enjoyed, it is difficult to appreciate the law’s reason for rejecting easements for trees. If the law recognises as an easement the right to have a building overhanging a neighbour’s

(*l*) See p. 26, *ante*.

(*m*) [1894] 3 Ch. 1 ; [1895] A. C. 1.

(*n*) [1895] A. C. 1, at p. 6.

(*o*) For the various forms of easements, see pp. 8 *et seq.*, *ante*.

land, why should it not recognise the same for a tree? Probably for the reason which Lord BLACKBURN gave as the reason why the law came to recognise the easement of light while rejecting a right to prospect—viz., that in the case of the former the balance of convenience and inconvenience was in favour of it, whilst in the latter it was against it (*oo*).

Civil Law with regard to Boundary Trees.—The rule of the civil law on the subject of boundary trees is as follows: If a tree strikes its roots into the neighbouring soil, nevertheless it remains his in whose land it had its origin (*p*). If a tree planted near a boundary extends its roots into the lands of a neighbour it becomes common (*q*).

SECTION 2.—REMEDIES FOR INJURIES ARISING FROM OVERHANGING BRANCHES OR PROJECTING ROOTS.

Nuisance caused by Overhanging Trees.—If a man allow his tree to grow so as to overhang the land of his neighbour the former is answerable for the damage caused to the latter (*r*). The wrong thus occasioned is a nuisance (*s*), in respect of which the neighbour has the following remedies: (1) He may recover by action damages for the loss thus occasioned (*t*); (2) he may obtain a mandatory injunction for the removal of the offending portion of the tree; or (3) he may himself abate the nuisance by the removal of so much of the branches as overhang his land (*u*).

(*oo*) See *Dalton v. Angus* (1881), 6 App. Cas. 740, at p. 824.

(*p*) Dig. xlvii. 7, 6, s. 2.

(*q*) Dig. xli. 1, 7, s. 13; Inst. ii. 1, s. 31.

(*r*) *Smith v. Giddy*, [1904] 2 K. B. 448.

(*s*) *Ibid.*; *Lemmon v. Webb*, [1894] 3 Ch. 1, at p. 24.

(*t*) *Smith v. Giddy*, *supra*; *Lemmon v. Webb*, *supra*, at p. 24.

(*u*) *Lemmon v. Webb*, *supra*.

Lawful Cutting of Overhanging Trees which cause no Damage.—A man may cut branches of his neighbour's trees where the branches overhang the boundary (*y*) ; and it would appear that it is not necessary for him to show that the overhanging branches have caused damage (*z*).

Thus in the case of *Lemmon v. Webb* (*a*) the boughs and branches of large trees overhung the land of the defendant. The defendant, without giving notice, cut some of these branches. The plaintiff brought an action for a declaration that the defendant was not entitled to cut any branches when such branches overhanging had continued for many years. KEKEWICH, J., refused the declaration, but ordered the defendant to pay damages and the costs of the action. The Court of Appeal allowed the defendant's appeal, being clearly of opinion that the defendant had committed no wrongful act ; and this decision was affirmed by the House of Lords (*b*).

But a man cannot cut the boughs of his neighbour's tree, merely for fear that those boughs will grow so as to overhang his land (*c*).

Poisonous Trees.—It is not an unlawful act to allow poisonous trees, such as yew trees, to grow near a boundary where a neighbour's cattle cannot reach them without trespassing (*d*). But if an owner allows poisonous trees to grow upon his land in such a manner that the branches overhang the boundary he is liable for the loss sustained by his neighbour whose cattle or animal are injured by eating the leaves (*e*).

(*y*) *Lemmon v. Webb*, [1894] 3 Ch. 1 ; [1895] A. C. 1 ; *Smith v. Giddy*, [1904] 2 K. B. 448. See also *Norris v. Baker* (1616), 1 Rolle, 394.

(*z*) *Lemmon v. Webb*, *supra*.

(*a*) [1894] 3 Ch. 1.

(*b*) [1895] A. C. 1.

(*c*) *Norris v. Baker* (1616), 1 Rolle, 394 ; *Lemmon v. Webb*, [1894] 3 Ch. 1, at p. 20.

(*d*) *Ponting v. Noakes*, [1894] 2 Q. B. 281. See also *Wilson v. Newberry*, L. R. 7 Q. B. 31.

(*e*) *Erskine v. Adeane* (1873), L. R. 8 Ch. 756 ; *Crowhurst v. Amersham Burial Board* (1878), 4 Ex. D. 5.

Trees Overhanging Highways.—If the occupier of land suffers his trees so to protrude over the highway as to inconvenience passers-by, that is a public or common nuisance, and the trees may be lopped (sufficiently to avoid the evil) by any of the public passing that way; for any one may justify the removal of a public or common nuisance which is so remediable (*f*); and, in fact, by the old law nobody was bound to cut his trees that overhung the road, and, therefore, anyone might do it (*g*).

Remedy of Abatement.—The reason, why the law allows the summary remedy by abatement, is because injuries which obstruct such things as are of daily convenience and use, require an immediate remedy and cannot wait for the slow process of the ordinary law (*h*). But the remedy, where its adoption would be the cause of danger, may be excluded by that very consideration. Thus, where a fence belonging to a railway company obstructs the thoroughfare, the public may not prostrate it, but must apply for a *mandamus* or pursue some other legal remedy for its removal (*i*).

Notice before Cutting Overhanging Branches.—It is not necessary, in strictness, where the branches of a man's tree overhang his neighbour's land, for that neighbour to give notice before cutting the overhanging branches (*k*). This, at any rate, is the law, where the cutting can be done on the neighbour's own land (*k*). If a man, however, adopts this remedy without first affording the owner

(*f*) 1 Hawk. P. C. 695; *Lonsdale (Earl of) v. Nelson* (1823), 2 B. & C. 311.

(*g*) 2 Bro. Abr. Nuisances, 28, *per* KEBLE, J., in 8 Hen. 7, c. 5; Dalton, c. 26. As to the powers of local authorities to remove or require the removal of branches overhanging a highway, see p. 213, *post*.

(*h*) 3 Bl. Com. 6.

(*i*) *Ellis v. London and South Western Rail. Co.*, 2 H. & N. 424; *Wyatt v. Great Western Rail. Co.*, 6 B. & S. 709.

(*k*) *Lemmon v. Webb*, [1894] 3 Ch. 1; [1895] A. C. 1.

of the tree an opportunity of lopping the offending branches, he may place himself in jeopardy of losing his costs, if litigation follows, even although he may be successful in that litigation (*l*).

Necessity of Notice where Entry is Necessary to Effect Cutting.—Although a man may justify entering the land of another to abate a nuisance (*m*), yet before entry it seems advisable in all cases to send notice to the other proprietor, in order first to give the latter an opportunity of remedying the evil himself (*n*).

But with regard to the necessity of such notice, it has been said that there is a distinction between nuisances committed in defiance of those whom such nuisances injure, and nuisances which arise from mere omissions: in the former case, it has been said, the injured party may abate them without notice to the person who committed them; in the latter that it does not seem that an individual may abate without notice, except in the case of the overhanging branches of trees, the permitting of which to overhang injuriously, is a most unequivocal act of negligence which distinguishes that case from other cases (*o*).

It seems doubtful, however, whether this distinction can now be regarded as sound.

It would appear that there are two cases where notice must be given before entry. The first is where there is likely to be a breach of the peace (*p*); and the second is where the land upon which the nuisance arises is in the occupation of a tenant whose term commenced pending the continuance of the nuisance (*q*).

(*l*) *Lemmon v. Webb*, [1894] 3 Ch. 1; [1895] A. C. 1.

(*m*) *Perry v. Fitzhove* (1846), 8 Q. B. 757; 2 Rolle, Abr. "Nusans" (*s*); Bro. Abr. Nuisance j 102 b 33; *R. v. Rosewell* (1699), Salk. 459.

(*n*) *Davies v. Williams* (1851), 16 Q. B. 546; 1 Chit. G. P. 569, 570.

(*o*) *Lonsdale v. Nelson* (1823), 2 B. & C. 311.

(*p*) See *Davies v. Williams* (1851), 16 Q. B. 546.

(*q*) *Penruddock's Case* (1738).

In general a distinction must be made according as the nuisance is one first *created* by the defendant, or is a continuing nuisance permitted by him to continue ; in the latter case, notice before abatement is, in general, necessary (*r*). For example, when A. builds a house, so that it overhangs the house of B., and is a nuisance to B. : and afterwards A. makes a feoffment of his house to C., and B. makes a feoffment of his house to D.,—the nuisance continuing,—D. cannot abate the nuisance,—or have a *quod permittat prosternere* for it,—before he makes a request to C. to abate it. For C. is a stranger to the wrong ; but it would be otherwise, if A. continued his estate,—for he did the wrong (*s*).

Abatement where the Offending Premises are in the Possession of a Receiver appointed by the Court.—

Where the premises in respect of which the nuisance arises are in the possession of a receiver appointed by the court, the remedy of abatement will nevertheless continue to be available ; but in such a case it is advisable for the party intending to enforce the remedy to apply to the court for leave (*t*).

Nuisances to Highways caused by Overhanging Branches.—A person who creates a public nuisance by allowing the branches of his trees to grow over the highway may be proceeded against, either by indictment, or by information at the suit of the Attorney-General ; but the summary remedy of complaint to the vestry or other proper local authority, is usually the most convenient remedy,—for the vestry or other competent authority will give notice to the occupier to cut the overhanging branches, and (on his failure so to do) will cut them them-

(*r*) *Winsmore v. Greenbank* (1745), Willes, 583 ; *Salmon v. Bensley* (1825), Ry. & Moo. 189.

(*s*) *Penruddock's Case* (1738), 5 Rep. 100. See also *Jones v. Williams* (1837), 11 M. & W. 176.

(*t*) *Lane v. Capsey*, [1891] 3 Ch. 411.

selves (*u*). In case any individual landowner suffers any private and particular damage from the overhanging trees,—*scilicet*, some damage beyond the injury done to him as one of the public,—he may proceed by action (*x*); and in such case, the Attorney-General need not be (*y*), but may be (*z*), made a party.

SECTION 3.—OWNERSHIP OF BRANCHES AND FRUIT FALLEN ON ADJOINING LANDS.

Civil Law.—By the civil law, if a tree on the boundary line between two properties in a town injured either property, the owner of the tree might be required to cut it down altogether, but if the properties were in the country, he could be required only to trim the branches of the tree fifteen feet up from the ground, and no higher, whatever the inconvenience might be to his neighbour. In case the party who was required to cut down the tree or to trim the branches refused so to do, the interdict *de arboribus cedendis* lay against him, at the instance of the other party; and he might appropriate the wood to himself (*a*).

English Law with regard to Branches and Fruit falling on to Another's Land.—By the English law, although a man may remove a nuisance, yet he cannot, in general, appropriate the materials and convert them to his own use (*b*). Accordingly, a person can have no right to the overhanging branches or protruding roots which he

(*u*) See p. 191, *ante*.

(*x*) *Winterbottom v. Lord Derby* (1867), L. R. 2 Ex. 316; *Rickett v. Metropolitan Rail. Co.* (1867), 5 B. & S. 156; *Att.-Gen. v. Logan*, [1891] 2 Q. B. 100.

(*y*) *Cook v. Mayor of Bath* (1868), L. R. 6 Eq. 177; *Walker v. Horner* (1875), 1 Q. B. D. 4; *Woodard v. Billericay Highway Board* (1879), 11 Ch. D. 214.

(*z*) *Att.-Gen. v. Logan*, *supra*.

(*a*) Colquhoun's Summary, §§ 993, 2305.

(*b*) *Forsdick v. Collins* (1814), 1 Stark. 173; *Houghton v. Butler* (1791), 4 T. R. 364.

cuts from his neighbour's trees, or to the fruit or the branches which fall accidentally therefrom. Thus, it has been said, if trees growing in a hedge overhang another man's land, and the fruit falls upon the other's land, the owner of the fruit may go in and retake it, if he makes no longer stay than is convenient, and does not break the hedge^(c). The same rule applies where the trees are blown down by the wind, or fall over by any other unavoidable accident^(d).

It would appear that the owner of the fruit cannot, without special circumstances shown to justify it, enter upon the adjoining land on which the fruit has fallen for the purpose of taking such fruit away without a previous request to the occupier upon whose land the fruit has fallen^(e). After such a request, a conversion might be presumed if entry be refused, and in such case, the owner of the fruit may enter and take his property^(f).

Rules of the Civil Law with regard to Fallen Fruit.

—According to the civil law, the proprietor upon whose land fruit had fallen from trees belonging to an adjoining proprietor was obliged to permit it to be gathered,—a right which was enforced by the interdict *de glande legendâ*^(g).

Crown Grants of the Right to Lop Branches, etc.—

It is competent for the Crown to grant to a parish within a royal forest the right to cut or lop boughs and branches for the purpose of obtaining fuel^(h). The Crown may also grant lawfully to the people of the parish, or to those of them who keep pigs, a right of pannage, or right to

(c) *Miller v. Fandrye* (1592), Poph. 163.

(d) *Vin. Abr. Trespass*, Ha. 2.

(e) *Anthoney v. Haney* (1829), 8 Bing. 186.

(f) See *Patrick v. Colerick* (1838), 3 M. & W. 483.

(g) *Colquhoun's Summary*, § 993.

(h) *Willingale v. Maitland* (1866), L. R. 3 Eq. 103; *Commissioners of Sewers v. Glassey* (1874), L. R. 19 Eq. 134.

allow their pigs to go into the wood and to eat the acorns or beech-mast, which have fallen to the ground. But rights such as these do not prevent the owner of the wood from lopping the trees in the ordinary course of management, or from cutting them down for timber when ripe (*i*).

(i) *Chilton v. Corporation of London* (1878), 7 Ch. D. 562.

CHAPTER XII.

EVIDENCE.

SECT.	PAGE
1.— <i>On Evidence Generally</i>	217
2.— <i>Interpretation of Parcels</i>	220
3.— <i>Rectification of Deeds</i>	223
4.— <i>Contemporanea Expositio</i>	224
5.— <i>Evidence of Reputation</i>	225
6.— <i>Various Forms of Documentary and other Evidence</i> ...	231

SECTION 1.—ON EVIDENCE GENERALLY.

Prefatory Remarks.—The material rules and principles of evidence in boundary cases are those which relate to the ownership of land. Evidence relating to the ownership of land may be either documentary evidence or evidence of physical ownership. The title to land generally depends on documentary evidence. Sometimes it depends partly on documentary evidence and partly on evidence of physical ownership. Sometimes it depends solely upon evidence of physical possession—a notable instance of this occurs in claims under the Statutes of Limitation. Again, although the title may depend on documentary evidence, that evidence may require explanation and support by evidence of physical ownership and of acts done consonant with the documentary title—as where there is an ancient grant of a manor and evidence is available throwing light upon its terms, *e.g.*, by showing that the foreshore has always since been claimed under the terms of the grant.

Intrinsic and Extrinsic Evidence.—In the majority of cases where disputes arise with regard to boundaries, the case is reducible to the question whether a particular piece of land (generally a slip of land) did or did not pass under a particular deed. Where the document in question is

of great antiquity, reference is frequently made to subsequent events. Where the document is of modern origin, although subsequent events in particular cases may have some bearing on the dispute, the dispute usually depends on the construction of the deed either without reference to circumstances outside the deed and circumstances subsisting at the time of its execution, or with reference to such circumstances. Where no reference is made to circumstances subsisting at the time of execution, the evidence is said to be intrinsic—the matter resolving itself into one of construction of particular terms of the document by reference only to the other terms of that document. Where reference is made to circumstances subsisting at the time of execution the evidence is said to be extrinsic. The rules relating to the admissibility of extrinsic evidence form a very important branch of the law of evidence.

In boundary cases, the rules of the construction and interpretation of documents, both as regards intrinsic evidence *simpliciter* and the admissibility of extrinsic evidence, are generally only material where the two adjoining pieces of land, the boundary between which affords the reason of the dispute, have been severed, in point of ownership, by the document in question.

Thus, where A owns two adjoining fields, Whiteacre and Blackacre, and he conveys Whiteacre to B., and subsequently Blackacre to C., the boundary between the two fields depends on the conveyance to B. If C. subsequently conveys Blackacre to D., the conveyance will not disturb B.'s boundary, nor will any subsequent disposition by D.'s successors in title have that effect.

Admissibility of Evidence.—Apart from any question of ambiguity, such evidence as is necessary to put the court in possession of the facts subsisting at the time when the deed or document was executed may be given; for the court ought to have the same knowledge of the

subject-matter of the document as the parties possessed at the time (*a*).

The first principle of the construction of written documents is to ascertain the intention of the parties. This intention must be gathered from the written terms; and all the terms must be construed as a whole (*b*). The whole document must be read in the light of the circumstances existing at the time of execution.

If the document on its face raises an obvious repugnancy which cannot be got rid of by any possible construction, the repugnant parts will be discarded (*c*), or the deed may be wholly void for uncertainty (*d*); but evidence outside the deed will not be admitted to ascertain the intention of the parties which, by reason of the repugnancy on the face of the document itself, cannot be ascertained from the written terms.

If, on the other hand, the document itself is clear, but when applied to the circumstances subsisting at the time of its execution, a latent ambiguity arises, then extrinsic evidence is admissible, from which the court may infer the true intention of the parties.

(*a*) "For the purpose of applying the instrument to the facts, and determining what passes by it, and who takes an interest under it, . . . every material fact [is admissible in evidence] to identify the person or thing mentioned in the instrument, and to place the court whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it" (*per* PARKE, B., in *Shore v. Wilson*, *infra*, at p. 555).

(*b*) *Shore v. Wilson* (1842), 9 Cl. & F. 355 [H. L.] (*per* COLERIDGE, J., at p. 526, and *per* PARKE, B., at p. 556). See also *Rickman v. Carstairs* (1833), 5 B. & Ad. 651, at p. 663; *Smith v. Lucas* (1881), 18 Ch. D. 531, at p. 542.

(*c*) "The result of all the authorities is that when a court of law can clearly collect from the language within the four corners of the deed or instrument in writing the real intention of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned" (*per* KELLY, C.B., in *Gwyn v. Neath Canal Co.* (1868), L. R. 3 Ex. 209, at p. 215).

(*d*) See *e.g.*, *Davies v. Davies* (1887), 36 Ch. D. 359.

SECTION 2.—INTERPRETATION OF PARCELS.

Interpretation of Parcels.—For our purposes the most important part of a deed or document of title is the “parcels”; and they are naturally those questions which arise in the construction of parcels which concern us most.

Parcels are usually described by any one or more of the following modes: (1) by reference to the nature of the property, *e.g.*, whether it be a dwelling-house, farm, or piece of arable land; (2) by reference to its general situation, *e.g.*, the parish and county where it is situated; (3) by reference to its measurements; (4) by reference to the abutments; (5) by reference to a plan whether annexed to the document or merely identified; (6) by reference to the past or present occupation.

Now, it frequently occurs that some one or more of these descriptions is or are found to be inaccurate, and questions arise with regard to this inaccuracy, as to the true meaning of the document.

In this respect there are two important and well established rules of construction. The first is embodied in the maxim, “*Falsa demonstratio non nocet, cum de corpore constat*,” that is to say, that a false description, by way of addition, does not matter where the thing itself is otherwise sufficiently described and ascertained (*e*). The second is embodied in the maxim, “*Non debent accipi in falsam demonstrationem, verba quæ competunt in veram limitationem*,” that is to say, that words of additional description

(*e*) *Doe d. Smith v. Galloway* (1833), 5 B. & Ad. 43, at p. 51; *Llewellyn v. Jersey (Earl of)* (1843), 11 M. & W. 183, at p. 189; *Morrell v. Fisher* (1849), 4 Ex. 591, at p. 604; *Wrotesley v. Adams* (1558), Plow. 187, at p. 191; *Willoughby (Lord) v. Foster* (1553), 1 Dyer, 80 b; *Portman v. Mill* (1839), 8 L. J. Ch. 161; *Manning v. Fitzgerald* (1859), 29 L. J. Ex. 24; *Rorke v. Errington* (1859), 7 H. L. Cas. 617, at p. 626; *Lambe v. Reaston* (1813), 5 Taunt. 207; *Shep. Touch.* 247. See also *In re Bright-Smith, Bright-Smith v. Bright-Smith* (1886), 31 Ch. D. 314; *Cunningham v. Butler* (1861), 3 Giff. 37 (cases of devises).

which have an actual applicability are not to be treated as *falsa demonstratio*.

Words rejected as Falsa Demonstratio.—Under the grant of a close called D., in the parish of H., in the county of S., if it be found that the parish of H. extends also into the county of B., and the whole of the close is in the last-mentioned county, the words "*in the county of S.*" will be rejected as a false addition easily accounted for, and the false addition will not invalidate the grant (*j*).

Where a piece of land, formerly part of a close, was conveyed by reference to a schedule annexed, and in the schedule it was described as numbered 153 on the plan, and as being in the occupation of J. E., and as containing, by estimation, thirty-four perches; and the plan was drawn to a scale, but it appeared that upon the admeasurement of the land upon the plan, the piece of land contained, in fact, only twenty-seven perches instead of thirty-four, the court held that the statement that the piece of land contained thirty-four perches was merely *falsa demonstratio*, and accordingly that the deed conveyed only the portion of land containing twenty-seven perches actually marked off on the plan (*g*).

The actual situation in the document of the discarded words of description is not in the least material in the question whether they ought to be discarded or not (*h*).

(*f*) *Austen v. Nelms* (1856), 1 H. & N. 225. See also *Doe v. Ashley* (1847), 10 Q. B. 663; *Doe v. Hubbard* (1850), 15 Q. B. 236; *Goodtitle v. Southern* (1813), 1 M. & S. 299; *Dyne v. Nutley* (1853), 14 C. B. 122; *Rand v. Green* (1860), 9 C. B. (N.S.) 477; *Manning v. Fitzgerald* (1859), 29 L. J. Ex. 24; *White v. Birch* (1867), 35 L. J. Ch. 174.

(*g*) *Llewellyn v. Jersey (Earl of)* (1843), 11 M. & W. 183. See also *Dublin and Kingstown Rail. Co. v. Bradford* (1857), 7 Ir. C. L. R. 57, 624; *Roe v. Lidwell* (1860), 9 Ir. C. L. R. 184; *Jack v. Macintyre* (1845), 12 C. & F. 151; *White v. Birch* (1867), 36 L. J. Ch. 174, where the words "in my own occupation" were rejected as *falsa demonstratio*.

(*h*) *Cowen v. Truefitt, Limited*, [1899] 2 Ch. 309, at pp. 311, 313.

Words retained as Operating to Qualify and Cut down the other Descriptions of the Property.—As we have seen words of description will not be rejected as *falsa demonstratio* where they can have the effect of qualifying the other descriptions of the property (*i*).

In general, this retention occurs where the other descriptions are of a general nature, and the words challenged have the effect of further cutting down the general description by pointing to part only of the property falling under the general description.

Thus, where the King granted all the houses, mills, lands, etc. in Wells, it was adjudged that of two mills under one roof, only the one in Wells passed (*k*). Again, in the case of a grant of all those messuages, etc. in the occupation of B. in the city of W., formerly belonging to the hospital of W, it was held that lands in the occupation of B., and formerly belonging to the hospital of W., but which were not in the city of W., did not pass (*l*).

If in a deed conveying land the description of the parcels is couched in such ambiguous terms that it is very doubtful what were intended to be the boundaries of the property, and the language of the description equally admits of two different constructions, of which the one would make the quantity of land conveyed agree with the quantity mentioned in the deed, and the other would make the quantity altogether different, the former construction must prevail (*m*).

(*i*) See p. 220, *ante*.

(*k*) *Hall v. Combes* (1594), Cro. Eliz. 368.

(*l*) *Doddington's Case* (1594), 2 Rep. 32 b. See also *Miller v. Travers* (1832), 8 Bing. 244; *Doe d. Parkin v. Parkin* (1814), 5 Taunt. 321; *Homer v. Homer* (1878), 8 Ch. D. 758; *In re Brocket, Dawes v. Miller*, [1908] 1 Ch. 185; *In re Seal, Seal v. Taylor*, [1894] 1 Ch. 316.

(*m*) *Davis v. Shepherd* (1866), L. R. 1 Ch. 410; *Marshall v. Berridge* (1881), 19 Ch. D. 233; *Tamplin v. James* (1880), 15 Ch. D. 216.

SECTION 3.—RECTIFICATION OF DEEDS.

Rectification of Deeds.—Where by the common mistake of all parties property has been in error excluded or included in a conveyance or similar document of title, the court may, under certain circumstances, rectify the deed so as to make it conform with the actual contract between the parties (*n*). Where there has been fraud or misrepresentation amounting to fraud the court will readily rectify or rescind the document (*o*). In the case of fraud, which unravels everything, there is no difficulty in looking into the evidence to see how the contract was induced as well as how it was carried out (*p*). Where, however, there is no fraud, the court will not admit evidence to show that the conveyance ought to be rectified, where the terms of the conveyance are in accordance with the written terms of the contract (*q*). The ground for this rule is, that evidence of the intention of parties, *dehors* the written agreement, cannot be received without infringing a well-known rule, for to grant relief in such a case would be equivalent to the grant of specific performance of a written contract with a parol variation (*r*).

It would appear that the court will not rectify on the ground of unilateral mistake, except in the case of fraud or fraudulent misrepresentation (*s*).

It seems clear that rectification will not be ordered as against an incumbrancer or purchaser for value without notice of the equity (*t*).

(*n*) *Beale v. Kyte*, [1907] 1 Ch. 564 ; *Cowan v. Truefitt, Limited*, [1899] 2 Ch. 309.

(*o*) *May v. Platt*, [1900] 1 Ch. 616, at p. 623.

(*p*) *Ibid.*

(*q*) *Davies v. Fitton* (1842), 2 D. & War. 225 ; *May v. Platt*, [1900] 1 Ch. 616 ; *Thompson v. Hickman*, [1907] 1 Ch. 550.

(*r*) *Thompson v. Hickman*, [1907] 1 Ch. 550, at p. 561 (*per* NEVILLE, J.).

(*s*) *May v. Platt*, [1900] 1 Ch. 616, at p. 623. *Cf.*, however, *Harris v. Pepperell* (1867), L. R. 5 Eq. 1.

(*t*) *Warwick v. Warwick* (1745), 3 Atk. 293 ; *Blackie v. Clark* (1852), 15 Beav. 595 ; *Davies v. Davies* (1841), 4 Beav. 54.

SECTION 4.—CONTEMPORANEA EXPOSITIO.

Contemporaneous Usage to Interpret Ancient Documents.—To ascertain the interpretation placed upon ancient grants and documents at the time of their execution, evidence is admissible to show the manner in which they were interpreted by persons living at that time. This doctrine is known as the doctrine of contemporaneous exposition, or *contemporanea expositio* (*u*).

This principle has been extended to allow of the admission of evidence of modern usage and acts of ownership to assist in the construction of ancient deeds. Thus, evidence of modern acts of ownership was held to have been properly admitted as evidence to show that grants by King John and King Edward the First of certain lands by the terms *terra de gower* and *dominium de terra de gower*, included the sea coast down to low watermark (*x*).

But the principle upon which evidence of ancient or modern usage is admitted to establish the construction or effect of an ancient grant or document, does not apply where the terms of the document are clear and admit of no doubt when applied to the subject-matter of the document (*y*).

It has been said that evidence of modern usage may be admitted to assist the interpretation of a modern grant or deed (*z*).

(*u*) 2 Co. Inst. 136 ; *Att.-Gen. v. Parker* (1747), 3 Atk. 576, at p. 577 ; *Att.-Gen. v. Drummond* (1842), 1 Dr. & War. 353, at p. 368 ; *Waterpark v. Fennell* (1859), 7 H. L. Cas. 650, at pp. 684, 685.

(*x*) *Beaufort (Duke) v. Swansea Corporation* (1849), 3 Ex. 413.

(*y*) “There can be no doubt,” said VAUGHAN WILLIAMS, L.J., in *Hastings (Lord) v. North Eastern Rail. Co.*, [1899] 1 Ch. 656, at p. 661, “that contemporaneous usage may be resorted to for the purpose of explaining any uncertainty or ambiguity in an ancient grant ; but then there must be ‘uncertainty or ambiguity.’” See also *De la Warr (Earl) v. Miles* (1881), 17 Ch. D. 535, at p. 573.

(*z*) *Van Diemen's Land Co. v. Table Cape Marine Board*, [1906] A. C. 92, at p. 98.

SECTION 5.—EVIDENCE OF REPUTATION.

Evidence of Reputation.—The situation of a boundary may be established by hearsay evidence where such evidence is admissible on the ground of reputation. It has been said that reputation is in general weak evidence (*a*). The reason for relaxing the rules of evidence which in general exclude hearsay evidence was stated by Lord CAMPBELL, C.J., in the following words: “The law of England lays down the rule that, on the trial of issues of fact before a jury, hearsay evidence is to be excluded, as the jury might often be misled by it; but makes exceptions where a relaxation of the rule tends to the due investigation of truth and the attainment of justice. One of these exceptions is where the question relates to matters of public or general interest. The term ‘interest’ here does not mean that which is ‘interesting’ from gratifying curiosity or a love of information or amusement, but that in which a class of the community have a peculiar interest, or some interest by which their legal rights or liabilities are affected. The admissibility of the declarations of deceased persons in such cases is sanctioned, because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; because direct proof of their existence therefore ought not to be required; because, in local matters, in which the community are interested, all persons living in the neighbourhood are likely to be conversant; because common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statements were false; and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject. But the relaxation has not been, and ought not

(*a*) *Weeks v. Sparke* (1813), 1 M. & S. 679 (*per* Lord ELLENBOROUGH, C.J.), at p. 687.

to be, extended to questions relating to matters of merely private interest ; for respecting these direct proof may be given, and no trustworthy reputation is likely to arise. We must remark, however, that, although a private interest should be involved with a matter of public interest, the reputation respecting rights and liabilities affecting classes of the community cannot be excluded, or this relaxation of the rule against the admission of hearsay evidence would often be found unavailing."

Evidence of reputation need not necessarily be touching a matter which concerns the general public at large. It may only concern a particular class such as the tenants of a manor or the free tenants of a district (*b*). Thus, where the inhabitants of a county were *primâ facie* bound to repair a bridge, evidence of reputation that part of the bridge was repairable by the lords of a manor *ratione tenuræ*, was held to have been wrongly rejected, because the exoneration of the county at large was taken to be a matter of public interest (*c*).

But in order to render declarations admissible as evidence of reputation, the declarations must have been made *ante litem motam* (*d*). They must also have been made by a person to whom competent knowledge may be reasonably imputed (*e*). Actual inhabitancy in the place the boundaries of which are in dispute is not, however, necessary to render the evidence of the declarant admissible (*f*).

Boundary Cases where Evidence of Reputation has been Admitted.—The following case affords an example

(*b*) *Mercer v. Denne*, [1905] 2 Ch. 538, at pp. 559, 560 (VAUGHAN WILLIAMS, L.J.).

(*c*) *R. v. Bedfordshire (Inhabitants)* (1855), 4 E. & B. 535.

(*d*) *R. v. Cotton* (1813), 3 Campb. 444 ; *Mercer v. Denne*, *supra*, at p. 560.

(*e*) *Rogers v. Wood* (1831), 2 B. & Ad. 245 ; *Talbot v. Lewis* (1834), 1 C. M. & R. 495.

(*f*) *Duke of Newcastle v. Broxtowe (Hundred)*, 4 B. & Ad. 273.

of the occasion on which evidence of reputation will be admitted in proof of the whereabouts of boundaries.

Where there was a question whether a certain common was within the parish and manor of A., or within the parish and manor of B., evidence was admitted of what old persons then dead had been heard to say concerning the boundaries of the parishes and manors, though not as to particular facts or transactions,—and this, though the old persons were parishioners, and claimed rights of common in the waste, which would have been enlarged by their declarations. It did not appear that there had been any dispute at the time the declarations were made respecting the rights of the persons making them,—at least no litigation was then pending, so that the declarants could not be considered as having it in view to make evidence for themselves by their statements (*g*).

In another case, evidence of reputation was admitted to show the boundaries between the new and the old land in a manor (*h*).

Declarations of deceased persons as to the boundaries of a reputed manor have been admitted as evidence of reputation (*i*).

Again, where it appeared that, from the year 1698, down to the year 1858, N. had maintained its own poor, and had never been charged with the support of the poor of any other place ; and in 1858, the owner of a large estate in the parish of T. found among the title deeds in his possession an agreement dated in 1698, purporting to be made between the then owner of N., on the one part, and several inhabitants of T., on behalf of the parish of T. on the other part, and by which it was recited that N. was part of T., and that it had been agreed that N. should maintain its own poor, and not be chargeable towards the

(*g*) *Nicholls v. Parker* (1805), 14 East, 331.

(*h*) *Barnes v. Mason* (1813), 1 M. & S. 81.

(*i*) *Doe d. Molesworth v. Sleeman* (1846), 9 Q. B. 298 ; 15 L. J. Q. B. 338. See also *Curzon v. Lomax*, 5 Esp. 60.

poor rate of the other part of the parish,—it was held that this agreement was admissible in evidence as an ancient document relating to the interests of all the estates in T., and that it was decisive evidence to show that N. was a part of the parish of T. ; and further that it was evidence also of reputation as to the extent of the parish, being a declaration by the deceased owner of N., and the other inhabitants of T. to that effect (*k*).

Ancient orders of sessions, containing statements respecting boundaries, have been admitted as evidence of reputation (*l*) ; but entries in parish books which recorded that the perambulations had taken a particular line have been rejected,—that being evidence of a particular fact, and not of general reputation (*m*).

Where the question was one of parish boundary, a book kept in the chapter-house of Salisbury, purporting to contain copies of leases granted by the dean and chapter, and their confirmation of leases granted by the bishop or the prebendaries, was put in evidence,—and it appearing that the book was open to the tenants of the manors belonging to the dean and chapter, and that many of the leases stated the district to be in the parish, it was thought the book was in the nature of a public document, and therefore admissible as evidence of reputation respecting the parish boundary (*n*).

Again, where, upon an inquiry as to the true boundary between two parishes and counties, certain presentments of a manor court were offered in evidence, in one of which the boundary was set out,—the presentments, although in a mutilated state, were held admissible, the parts torn off appearing not to have contained any matter connected with the subject of the boundary (*o*).

(*k*) *R. v. Mytton* (1860), 2 E. & E. 557.

(*l*) *Newcastle v. Broxtowe* (1832), 4 B. & Ad. 273.

(*m*) *Taylor v. Dorey* (1837), 7 A. & E. 409.

(*n*) *Coombs v. Coether* (1829), M. & M. 398.

(*o*) *Evans v. Rees* (1839), 10 A. & E. 151.

Evidence of reputation that a town extended to a certain point has been admitted, where old persons since deceased had declared that point to be the boundary, but so far as their declarations were as to a particular fact, they were rejected (*p*).

On the other hand, where the lord of a manor brought an action of trespass for wreck, and an ancient document was tendered in evidence to prove the lord's right to wreck, the document purporting to be the answers of certain tenants of the manor to questions by commissioners of survey appointed by the then lord, and the document stating that the spot where the trespass was committed was within the boundaries of the manor, and that the lord was entitled to wreck within the manor,—the court held, that the document was admissible as evidence of the boundaries of the manor, but not as evidence of the lord's right to wreck,—such latter right not being a matter of public concern, or one respecting which the jurors had peculiar means of knowledge (*q*).

Where there was a question whether a certain waste was parcel of a certain farm, evidence of declarations of old persons deceased as to what was the ancient boundary of the waste belonging to the farm was rejected, the question not relating to the boundary of a parish or manor, but of a private estate (*r*).

Where there was a question whether a particular road was a public or a private road, hearsay evidence to the effect that a person, when a boy, planted a tree, saying that he did it to show the boundary of the road, was rejected, as being evidence concerning a particular fact (*s*).

(*p*) *Ireland v. Powell*, cited by WILLIAMS, J., in *R. v. Bliss* (1837), 7 A. & E. 550, at p. 555.

(*q*) *Talbot v. Lewis* (1834), 1 C. M. & R. 495.

(*r*) *Clothier v. Chapman* (1805), 14 East, 331.

(*s*) *R. v. Bliss* (1837), 7 A. & E. 550. See also *R. v. Berger*, [1894] 1 Q. B. 823.

And, where the declarations of deceased tenants who had been entitled only to rights of common, appendant over a waste were held inadmissible to prove that a certain spot was parcel of the waste their rights being of too *private* a nature to admit of declarations concerning them being received as evidence of reputation, it was stated that if the question had been one in which *all* the inhabitants of the manor, or *all* the tenants of the manor, had been interested, reputation from any deceased inhabitant or tenant, or even deceased resident in the manor, would have been admissible ; and that if there had been a common law right for *every* tenant of the manor to have common on the waste of it, reputation from any deceased tenant as to the extent of those wastes,—and therefore as to any particular land being waste of the manor,—would have been admissible, but that common appendant, however, was not the common right of all the tenants of a manor, but belonged only to each grantee, before the statute *Quia Emptores*, of arable land, by virtue of his individual grant and as an incident thereto (*t*). Nor will the mere fact that there are numerous tenants having common appendant over the wastes give to their rights a *public* character that will render declarations admissible as evidence of reputation (*u*).

If it be shown that the boundary of two private estates is identical with that of two hamlets or parishes, then evidence of reputation may be put in, just as much as if the boundary of the parishes or hamlets was the only matter in issue (*x*).

(*t*) *Dunraven v. Llewellyn* (1850), 15 Q. B. 791, 809.

(*u*) *Dunraven v. Llewellyn* (1850), 15 Q. B., at p. 811. See also *Reed v. Jackson* (1801), 1 East, 355 ; *Doe d. Didsbury v. Thomas* (1811), 14 East, 323 ; *Williams v. Morgan* (1850), 15 Q. B. 782.

(*x*) *Thomas v. Jenkins* (1837), 6 A. & E. 525 ; *Brisco v. Lomax* (1838), 8 A. & E. 213.

SECTION 6.—VARIOUS FORMS OF DOCUMENTARY AND OTHER EVIDENCE.

Verdicts, decrees, judgments, and other adjudications upon matters of a public nature, are admissible as evidence, not precisely as reputation, but as the decisions of competent tribunals on the matters involved (*y*).

Where there was a question relating to the boundary between the manors of W. and O., and the plaintiff set up the case that the boundary line between the two manors was a ridge of mountain from which the waters descended in opposite directions, it was held, that he might show, in support of this, that the boundary between the adjoining manor of I. and the manor of O. was the same mountain ridge, and that he might prove that fact by the finding of a jury summoned from the Duchy of Lancaster for the purpose of determining the boundary between the manors of I. and O., on the petition of certain former owners of I. and O., who had represented that the boundary was uncertain, and that suits were likely to grow between them (*a*).

Awards.—Awards of arbitrators do not, however, stand upon the same footing as verdicts, with regard to their general admissibility as evidence. An award is but the opinion of the arbitrator, formed, not upon his own knowledge, as declarations used by way of reputation commonly are, but on the result of evidence laid before him, most

(*y*) See *Lee v. Johnstone* (1869), 1 L. R., Sc. App. 426, as to the value to be attached to ancient decrees as evidence, when they have been followed by possession and have been recognised for a long period of time.

(*a*) *Brisco v. Lomax*, 8 A. & E. 210, in which case it was said by LITTLEDALE, J.: "On a question of boundary, mere reputation is evidence. But I put this as a verdict, not as reputation. It is a trial by witnesses competent to speak to the fact. Now reputation being evidence, the verdict must be evidence . . . ; and this though the former proceeding was between different parties. It is not a reputation; but it is *as good evidence as reputation*" (citing *Reed v. Jackson*, 1 East, 355).

probably in private, and formed also *post litem motam*, having none of the qualities upon which evidence of reputation rests (*b*). It may be said that the verdict of a jury is equally defective in those qualities. Whether it be so or not, it is sufficient to say that the admissibility of a verdict as evidence of reputation is established by too many authorities to be now questioned, but the principle of those authorities is not clear enough to embrace an award (*c*).

But, of course, in a subsequent suit between the same parties, or those claiming through them, the award would be admissible,—not as hearsay at all, but as evidence properly so called (*d*).

Ancient patents and inquisitions have been admitted as evidence of reputation to show the extent of a navigable river (*e*). In *Plaxton v. Dare* (*f*), ancient leases were held to have been properly received as evidence of reputation in a question of a parish boundary ; and old books of account, containing evidence of the payment of parish rates, were also admitted.

Admission of Ancient Leases and Licences, etc., in Proof of Acts of Ownership.—"Old leases," said Lord CAIRNS, in *Bristow v. Cormican* (*g*), "have always been considered to be admissible as being evidence of acts of ownership. I understand this to rest on the principle, that when at a distant period, as to which there is no more direct evidence available, you find a person claiming to be the owner of property, and willing to make himself

(*b*) *Evans v. Rees* (1839), 10 A. & E. 151. As to evidence of reputation, see pp. 225 *et seq.*, *ante*.

(*c*) *Evans v. Rees* (1839), 10 A. & E. 151, *per* Lord DENMAN, C.J., at p. 156.

(*d*) *Breton v. Knight* (1837), cited in Roscoe's Evidence at Nisi Prius, 18th ed., 220.

(*e*) *Donegall v. Templemore*, 9 Ir. C. L. R. 374 ; *In re Belfast Dock Act*, 1 Ir. Rep. 128.

(*f*) (1829), 10 B. & C. 17 ; 5 M. & R. 1.

(*g*) (1878), 3 App. Cas. 641. See also *Doe d. William 4, Jones v. Roberts* (1844), 13 M. & W. 520.

responsible as lessor for the title to it, and another person willing to agree to give rent for the property, and to enter into a solemn engagement as a tenant of it, admitting his landlord's title, these circumstances are of themselves admissible as evidence of the title ; they are real transactions between man and man, not intelligible except on the footing of title, or at least an honest belief of title. The payment of rent under such a lease is a further and additional fact also admissible as evidence and on the same principle."

Old licences, in the nature of leases, are, in this respect, on the same footing as ancient leases. Where some old licences were offered in evidence, it was said that there was no distinction between old licences and old leases that were always received in evidence in favour of those claiming under the lessors ; and that it was not necessary to prove payment under the licences, as they were of such an ancient date that it could not reasonably be supposed that evidence of such payments was still preserved (*h*).

Where the plaintiff brought an action to determine whether a certain piece of land was subject or not to rights of common in favour of the defendant, an ancient document (some 240 years old) found in the muniment room of the plaintiff and purporting to place on record the fact that a predecessor in title of the plaintiff had been persuaded to stop proceedings for trespass, against a tenant of a predecessor in title of the defendant, the document was held admissible by the Court of Appeal, not as an act of ownership, but as evidence of an act of ownership. The document purported to contain an undertaking by the tenant to pay a sum of money and not to repeat the trespass of depasturing sheep (*i*).

Evidence of Possession, as against a Trespasser.—Trespass is a wrong inflicted by interference with actual

(*h*) *Rogers v. Allen* (1808), 1 Camp. 309.

(*i*) *Blandy-Jenkins v. Dunraven (Earl of)*, [1899] 2 Ch. 121.

possession. When it is not a question of a title paramount the question arising in cases of trespass is generally the question of actual possession. In general evidence of actual possession is more readily obtainable than evidence of title. The following cases and dicta exemplify the distinction between proof of a possessory title sufficient to support an action for trespass, and proof of title as against another claimant settling up title.

In *Hastings (Corporation) v. Ivall* (*k*), a possessory title in the plaintiffs to the foreshore was held sufficient as against a trespasser, without producing evidence sufficient to displace the title of the Crown (*l*) ; and the plaintiffs having produced some evidence of their title to the foreshore, the defendant was debarred from proving any acts of ownership by the Crown, except such as had been done with the knowledge of the plaintiffs. With regard to the portion of the beach which in that case was covered with shingle, varied according to the state of the wind and the tide, the court held, that, as against a trespasser, the Crown grant of parcel of the foreshore was to be construed liberally, so as to embrace the whole beach covered with shingle, as well below as above high-water mark.

A "documentary title," said Lord CAIRNS, in *Bristow v. Cormican* (*m*), "commencing with some person rightfully in possession, or who has an admitted or proved right to be in possession, and connecting itself with a plaintiff in an action of trespass, [will], generally speaking, and in the absence of any title in the defendant by adverse possession, be sufficient to maintain an action of trespass." "There can be no doubt," said Lord HATHERLEY, in the same case (*n*), "that mere possession is sufficient against

(*k*) (1874), L. R. 19 Eq. 558.

(*l*) As to the *prima facie* title of the Crown to the foreshore, see p. 30, *ante*.

(*m*) (1874), 3 App. Cas. 641, at p. 652.

(*n*) *Ibid.*, at p. 657.

a person invading that possession, without himself having any title whatever,—as a mere stranger ; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser.”

Maps of a Private Nature.—Maps and plans not falling under the category of public documents are not, in general, admissible in proof of the whereabouts of a boundary (*o*). The exceptions to this rule fall under two heads, viz. : First, where the map or plan is admitted on the ground of reputation (*p*) ; and, secondly, where it is admitted on the footing of its amounting to an admission against interest by a predecessor in title of one of the parties disputing the boundary (*q*).

The following case illustrates the reasons for the non-admissibility of private maps and plans as a general rule.

Where, in order to show that a certain place was not in a certain county, a map was produced by a witness, who had purchased it twelve or fourteen years before, and in whose custody it had ever since been, it was held that the map was not admissible. The map was printed on paper from an engraved copper-plate, and contained words printed thereon as part of the original impression to the effect that it was a map taken in 1766 from an original map published by a person in 1736, who had taken an actual and accurate survey of the whole county.

The court pointed out that although in one sense the map did come from proper custody because it was produced by one who bought it twelve years ago, yet the

(*o*) *Hammond v. Bradstreet* (1854), 10 Ex. 390 ; *Phillips v. Hudson* (1867), 2 Ch. App. 243, at p. 247 ; *Pipe v. Fulcher* (1858), 1 E. & E. 111 ; *R. v. Berger*, [1894] 1 Q. B. 823.

(*p*) *R. v. Milton* (1843), 1 C. & K. 58.

(*q*) *Bridgman v. Jennings* (1699), 1 Ld. Raym. 734 ; *Doe d. Hughes v. Lakin* (1836), 7 C. & P. 481.

fact of its being in the custody of the party who had such lawful possession of it did not at all vouch for its authenticity, or that it was what it professed to be. Further, that the persons who made the map did not appear to have been deputed to make it by any persons interested in the question, or to have had any knowledge of their own on the subject, or to have been in any way connected with the district, so as to make it probable that they had such knowledge (*r*).

As stated above (*s*), there are exceptions to the general rule that maps and plans of a private nature are not admissible.

Such maps may be admitted on the principle of reputation (*t*). Thus, where a map of a parish was offered in evidence, and it was proved by the surveyor who made it, that thirty-four years before the trial he laid down the boundaries of the parish from the information of an old man, who went round and showed them to him, it was held that the map might properly be received as evidence of reputation,—the old man's death being first proved (*u*).

Again, maps and plans of a private nature may be admitted in evidence on the ground of their amounting to an admission against interest by some predecessor in title of, or some person being in privity with, one of the parties disputing the boundary. Thus, where one seised of two manors, during his seisin thereof, caused a survey to be taken of one manor, which was afterwards alienated, and subsequently a dispute as to the boundaries arose between the lords of the respective manors, it was held that the survey might be given in evidence (*x*). Again, as between two adjoining proprietors, a private map would be receiv-

(*r*) *Hammond v. Bradstreet* (1854), 10 Ex. 390.

(*s*) See p. 235, *ante*.

(*t*) As to the general principles of the admission of evidence on the ground of reputation, see p. 225, *ante*.

(*u*) *R. v. Milton* (1843), 1 C. & K. 58.

(*x*) *Bridgman v. Jennings* (1699), 1 Ld. Raym. 734.

able in evidence where, at the time the map was made, the two adjoining properties belonged to the person under whom both parties derived their respective titles (*y*).

Maps annexed to deeds stand, of course, on the same footing as the deeds, and do not require special mention here. The weight or effect of the indications on such a map is a question of construction (*a*).

Maps Annexed to or Contained in Inclosure Awards.

—Maps annexed to or contained in inclosure awards are admissible in evidence in questions only between parties to the inclosure or their successors in title, but not, it seems as against persons not privy in estate or contract to the inclosure proceedings. Thus, where, upon an indictment for obstructing a highway, the map on the inclosure award was produced to prove the boundaries of the highway, and it appeared that the defendant (the adjoining owner) was not party or privy to the inclosure proceedings, the map was inadmissible (*b*).

Tithe Maps.—A tithe commutation map is not evidence of boundary, as between two persons adversely disputing their titles to the land in question (*c*).

But where there was a question of the existence of a highway, a map prepared under the provisions of the Tithe Commutation Act, 1836, has been admitted in evidence on the ground of its being a public document, and, apparently, because it was a matter of public concern whether the land was tithable; for the soil of the highway would not have been tithable (*d*).

(*y*) *Doe d. Hughes v. Lakin* (1836), 7 C. & P. 481.

(*a*) As to the effect of maps upon the construction of the parcels in a deed, see p. 220, *ante*.

(*b*) *R. v. Berger*, [1894] 1 Q. B. 823.

(*c*) *Wilberforce v. Hearfield* (1877), 5 Ch. D. 709.

(*d*) *Att.-Gen. v. Antrobus*, [1905] 2 Ch. 188, at p. 193; *Copestake v. West Sussex County Council*, [1911] 2 Ch. 331, at p. 341.

On the other hand, a similar map has been held to be inadmissible to show the extent of the highway (*e*).

Crown Surveys and Extents.—Ancient surveys and extents, if produced from the proper custody, and proved to have been made under the proper authority, are receivable in evidence as public documents in questions of boundary (*f*). Thus, an ancient extent of Crown lands, found in the office of land revenue records, and purporting to have been made by the steward of the Crown lands, was held to be evidence of the title of the Crown to the property which was mentioned therein,—being property which the extent stated to have been purchased by the Crown of a subject (*g*). Again, where a survey had been made of Crown property by a surveyor in discharge of a public duty imposed on him by statute, and required as a condition precedent to the sale of the Crown property by commissioners, it was held that the survey was admissible as a public document (*h*).

In general, we may observe, the test in such cases whether a document, such as a Crown survey, is admissible as a public document or not, is to be found in the question whether or not the document was made on a public inquiry by a public officer having judicial or quasi-judicial functions, for the purpose of public use or reference (*i*).

In the light of the above test, it is clear that many surveys, etc., made for or on behalf of the Crown do not reach the standard of public documents. Thus, a survey made on behalf of the Crown as a private owner, for the

(*e*) *Copestake v. West Sussex County Council*, *supra*, at p. 341.

(*f*) *Evans v. Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241.

(*g*) *Doe d. William 4, Jones v. Roberts* (1844), 13 M. & W. 520.

(*h*) *Evans v. Merthyr Tydfil Urban District Council*, *supra*. See also *New Romney (Corporation) v. Commissioners of Sewers of New Romney*, [1892] 1 Q. B. 840.

(*i*) See *per* Lord BLACKBURN, in *Sturla v. Freccia* (1880), 5 App. Cas. 623, at p. 643.

private purposes of the Crown, would not be a public document admissible in evidence as such (*k*). Again, where an instrument was offered in evidence which purported to be the survey of a manor at one time parcel of the Duchy of Lancaster, and the instrument was produced from the office of the duchy, and purported to have been taken by the deputy of the surveyor-general of the duchy, by authority of letters of deputation to him, and by the oaths and presentment of the tenants of the manor, whose names were subscribed, but no other authority for taking the survey was proved,—it was held, that the instrument, although it purported to contain a description of the parcels and a statement of the customs of the manor, was inadmissible on a question relating to the boundaries of the manor (*l*). Again, where it appeared that, in the reign of Charles the First, the Crown had granted in fee farm “a messuage, and escheat lands and tenements, containing by estimation 112 acres, situate in the vill of K., now or late in the occupation or tenure of D.,” the defendant, for the purpose of proving that a farm called Plas Bach was parcel of the 112 acres, tendered in evidence a presentment from the office of Land Revenue Records made in the eleventh year of the reign of Queen Elizabeth, in which presentment lands called y Plas Baghe were mentioned as being in the township or vill of K., and in the occupation of D.,—it was held that the presentment was no more than a survey taken by a private individual for his own purposes, and therefore could not be received in evidence as a public document. The court was of opinion, however, that if the survey had been tendered as evidence for the purpose of showing that the farm was in one vill or another, it would have been admissible on the ground of reputation (*m*). Again, where in support of an alleged customary payment in the nature of a wayleave rent for all coal gotten within the manor and exported,

(*k*) *Phillips v. Hudson* (1867), L. R. 2 Ch. App. 243.

(*l*) *Evans v. Taylor* (1838), 7 A. & E. 617.

(*m*) *Daniel v. Wilkin* (1852), 7 Ex. 429.

the plaintiff tendered in evidence a book purporting to be a survey taken in the year 1650 (after the manor had been granted to Oliver Cromwell), and purporting to have been taken by virtue of a commission to certain persons named in the survey, and which commission purported to have been given by Oliver Cromwell, Lord General of the Parliamentary Forces; and the book contained what purported to be a presentment by the homage jury to the effect that 4*l.* was due unto the lord for every wey of coals transported out of the lordship; but it appeared that the presentment was not signed by the jury, and no authority for the survey was shown,—the court held the survey to be inadmissible in evidence, either as a public document, or as evidence of reputation (*n*).

Ecclesiastical Terriers.—Ecclesiastical terriers, containing a detail of the temporal possessions of the church in every parish, made from time to time by virtue of the 87th canon and directed to be kept in the bishop's or archdeacon's registry, or occasionally in the chest of the parish church, are receivable in evidence, provided they come from the proper custody (*o*). In general all old terriers or surveys of a manor, whether ecclesiastical or temporal, may be given in evidence, provided they come from the proper custody, for often there can be no other way of ascertaining the old tenures or boundaries.

But a terrier of glebe lands is not evidence in favour of the incumbent unless it be signed by the churchwardens as well as the parson. Even then it is not evidence if the churchwardens be of the parson's nomination. When signed by both churchwardens and parson, a terrier deserves little credit unless it is signed also by the substantial inhabitants of the parish. But it is evidence as against the parson (*p*). A terrier of the parish which

(*n*) *Beaufort v. Smith* (1849), 4 Exch. 450.

(*o*) See *Coombs v. Coether* (1829), Moo. & M. 398; *Croughton v. Blake* (1843), 12 M. & W. 205; *Earl v. Lewis* (1801), 4 Esp. 1.

(*p*) *Buller N. P.* 248; *Atkins v. Hatton* (1793), 2 Anstr. 387; *Carr v. Mostyn* (1850), 5 Exch. 69.

is not signed by any parish official or person bearing any public character in the parish is not evidence (*q*).

Under an issue to try the boundaries of a parish, papers handed over to the incumbent by the representatives of his predecessor, as papers belonging to the parish and found in the late incumbent's possession, will be admitted, without requiring any proof from the predecessor's representatives as to how the papers came into their custody (*r*).

Proceedings before the Tithe Commissioners and Board of Agriculture and Fisheries.—The proceedings of the Tithe Commissioners (if properly authenticated, that is to say, all copies of such proceedings, certified under the seal of the commissioners) are, by the Tithe Commutation Acts (*s*), made receivable in evidence ; and under the Board of Agriculture Act, 1889 (*t*), copies of the Board's proceedings, under the seal of the Board, are receivable in evidence.

Entries in Domesday Book.—Domesday Book, as being a public inquisition, is admissible as evidence of boundaries. This book, which is the most ancient inquisition extant, was compiled a few years after the Norman Conquest by certain commissioners, styled the Justiciaries of the King, upon the oaths of the sheriffs, the lords of manors, the presbyters of churches, the reeves of hundreds, and the bailiffs of villages, together with six villans from every village ; and the book contains a general survey of all the counties in England, except the four northern, and specifies the name and local position of every place, its possessor in the time of King Edward the Confessor, and its possessor at the time of the survey, together with

(*q*) *Earl v. Lewis* (1801), 4 Esp. 1. See also *Cooke v. Banks* (1826), 2 C. & P. 478.

(*r*) *Earl v. Lewis*, *supra*.

(*s*) 6 & 7 Will. 4, c. 71, s. 2. See also *Gifford v. Williams*, 38 L. J. Ch. 598.

(*t*) 52 & 53 Vict. c. 30 ; 3 Edw. 7, c. 31.

(among other particulars) the number of hides of land in the manor, the number of carrucates in the demesne, the quantity of wood, meadow, and pasture land, etc., etc. And although by reason of the many changes which have happened during the years that have elapsed since its compilation, these descriptions no longer hold good, the book is still of the greatest utility,—as well as of the highest authority,—in the matter of boundaries (*u*).

The Down Survey.—The Down Survey, as regards Ireland, is also admissible evidence of boundary,—being made so by the statutes 14 & 15 Car. 2, c. 2, and 17 & 18 Car. 2, c. 2, s. 5 ; and it is conclusive as regards the boundaries between the lands apportioned among the original Irish and the lands apportioned to the English and Scotch settlers.

Ordnance Surveys.—The Ordnance Survey maps are not public documents within the rule above mentioned (*x*) ; and consequently they are not admissible as evidence between owners disputing the true position of the boundary between their respective properties (*y*). These maps have, however, been admitted in some cases to show the position of physical objects (*z*).

The Ordnance Survey maps of Ireland are not admissible as evidence of boundaries (*a*).

Declarations of Deceased Persons against their own Interest.—Declarations of a deceased lord of the manor, as to the extent of the wastes of the manor, are

(*u*) See *e.g.*, *Alcock v. Cooke* (1829), 5 Bing. 340 ; *Beaufort (Duke) v. John Aird & Co.* (1904), 20 T. L. R. 602, where entries in Domesday Book were admitted in evidence.

(*x*) See p. 238, *ante*.

(*y*) *Bidder v. Bridges* (No. 2) (1885), 34 W. R. 514.

(*z*) *Great Torrington Commons Conservators v. Moore Stevens*, [1904] 1 Ch. 347, at p. 353 ; *Att.-Gen. v. Antrobus*, [1905] 2 Ch. 188, at p. 203.

(*a*) *Swift v. M'Tiernan* (1848), 11 Ir. Eq. R. 602 ; *Tisdall v. Parnell* (1863), 14 Ir. C. L. R. 1.

admissible in evidence, if and so far as they are made against interest, but not otherwise (*b*). Thus, where the defendant had, in a chancery suit, made certain admissions with respect to boundary, and the boundaries again came into question in an action at law, the admissions were read against him, although the plaintiff was a stranger (*c*).

Land Tax and Poor Rate Assessments.—Extracts from the land tax or poor rate assessments, being evidence of seisin, have also been admitted as evidence in questions concerning boundaries (*d*).

Perambulations.—Evidence derived from perambulations has always been of first-rate importance in questions relating to boundaries. Perambulations were formerly largely in vogue as a convenient method of preserving the notoriety of the whereabouts of a boundary such as that of a parish or of a manor. The persons taking part in the perambulation walked in a body round the reputed boundary and their itinerary was in general usually recorded by some person having a *quasi*-official function, such as the steward of the manor. The youthful inhabitants of the district frequently accompanied the perambulation. By these means valuable evidence of reputation was perpetuated. Sometimes where the boundary was extensive the perambulation continued for several days.

The system of perambulation appears to be of very ancient origin. In many cases immemorial local customs have been upheld by the courts justifying the persons

(*b*) *Crease v. Barrett* (1835), 1 C. M. & R. 919; *R. v. Exeter Governors* (1869), L. R. 4 Q. B. 341; *Taylor v. Witham* (1876), 3 Ch. D. 605. See also *In re Fountaine*, *Fountaine v. Amherst*, [1909] 2 Ch. 382, at p. 390.

(*c*) *Richards v. Morgan* (1863), 4 B. & S. 641.

(*d*) *Doe d. Smith v. Cartwright* (1824), 1 C. & P. 218; *Doe d. Stansbury v. Arkwright* (1833), 2 A. & E. 182 n.; *Plaxton v. Dare* (1829), 10 B. & C. 17; *Doe d. Strobe v. Seaton* (1834), 2 A. & E. 171; *Anstee v. Nelms* (1856), 1 H. & N. 225.

taking part in the perambulation to pass over private land in the course of the itinerary (*e*).

Perambulations were usually made of the boundaries of a parish (*f*), or of a manor (*g*), or even of a liberty (*h*) or hundred (*i*). Perambulations of a private estate appear never to have been in vogue and from the nature of the case the value of such a perambulation would appear to be negligible.

It appears a perambulation by the lord of the manor made in a public manner is evidence against persons not present at the perambulation, but that the weight of such evidence will not be great (*k*).

Evidence of Acts of Ownership.—Evidence of acts of ownership is freely admitted in cases of disputed boundaries. We have already commented on the significance of acts of ownership in these cases (*l*). The weight of the evidence of acts of ownership depends necessarily upon the general circumstances of the case, including, amongst others, the nature of the act done, the nature of the *locus in quo*, and the weight of the evidence of the acts of ownership done by the opposing party or his predecessors in title.

Boundaries of Copyholds.—As regards the boundaries of copyhold lands, it is frequently impossible to ascertain

(*e*) See *Goodday v. Michell* (1595), Cro. Eliz. 441 ; *Taylor v. Darcy* (1837), 7 A. & E. 409 ; *Grant v. Kearney* (1823), 12 Price, 773 ; *Chesterfield (Lord) v. Harris*, [1908] 2 Ch. 397, at p. 407. See also, as to perambulations, p. 243, *ante*.

(*f*) See *e.g.*, *Goodday v. Michell*, *supra*.

(*g*) See *e.g.*, *Woolway v. Rowe* (1834), 1 A. & E. 114.

(*h*) See *e.g.*, *Grant v. Kearney*, *supra*.

(*i*) See *Chesterfield (Lord) v. Harris*, [1908] 2 Ch. 397, at p. 407, where COZENS-HARDY, M.R., stated that perambulations of a hundred were not usual.

(*k*) *Woolway v. Rowe*, *supra*.

(*l*) See p. 217, *ante*. As to the effect of proof of acts of ownership in support of a claim to the foreshore, see p. 33, *ante*.

the exact boundaries by their old descriptions, as the descriptions of copyhold property on the court rolls are usually most vague and general. Accordingly there is a general rule that a vendor is not bound to show how the description on the court roll is to be applied to the present state of the property ; and specific performance may be ordered on proof that the property has been in fact enjoyed for forty years under those descriptions (*m*).

Entries on the court rolls,—as well of surrenders and of admissions as also of presentments,—are evidence as between the tenants, although the lord, in proof of the boundaries of his manor, may or may not be entitled to use them (*n*).

(*m*) *Long v. Collier* (1828), 4 Russ. 276.

(*n*) *Irwin v. Simpson* (1758), 7 Bro. P. C. 317 ; *Standen v. Christmas* (1847), 10 Q. B. 135.

CHAPTER XIII.

REMEDIES.

SECT.	PAGE
1.— <i>Remedies where Animals Escape through Fences</i> ...	246
2.— <i>Remedies in the Case of Party Walls</i> ...	250
3.— <i>Remedies for the Wrongful Confusion of Boundaries</i> ...	251

SECTION 1.—REMEDIES WHERE ANIMALS ESCAPE
THROUGH FENCES.

We have pointed out (*a*) that a person who places animals on his land must retain them on that land so as to prevent them from straying on to the land of his neighbour. If he fails in this the neighbour has the following remedies against him—distress *damage feasant*, action for damages.

Distress Damage Feasant.—This remedy consists in taking possession of animals which have been wrongfully allowed to stray on to a person's land. It is an ancient remedy like distress for rent, but fewer statutory provisions modify it. The remedy can only be pursued where the animal has caused actual damage. The damage may be to the soil and produce thereof (*b*) ; or it may be to other animals on the land (*c*). Unlike distress for rent, distress *damage feasant* may be made at night (*d*). It must be made at the time when the damage is done (*e*) ; and it must be made on the land (*f*). “If a man,” says

(*a*) See p. 95, *ante*.

(*b*) Gilbert on Distress, pp. 21, 24.

(*c*) *Boden v. Roscoe*, [1894] 1 Q. B. 608.

(*d*) Co. Litt. 142 a.

(*e*) Co. Litt. 161 a.

(*f*) *Vaspor v. Edwards* (1701), 12 Mod. 661.

COKE (*g*), "come to distrain for *damage feasant* and see the beasts on his soil, and the owner" [*i.e.*, the owner of the beasts] "chase them out of purpose before the distress is taken, the owner of the soil cannot distrain them, and if he doth, the owner of the cattle may rescue them, for the beasts must be *damage feasant* at the time of the distress."

When animals are distrained *damage feasant* they must be impounded. If they are merely impounded in a private pound, the owner may tender sufficient recompense, and if such tender be refused, the distress becomes unlawful (*h*). If they are impounded in a common pound, they are retained there by the pound-keeper pending the payment of satisfaction and of certain charges (*i*). The owner may, however, replevy them (*k*).

There are certain statutory enactments placing a limit upon the distance that animals distrained *damage feasant* may be taken. It is provided that no distress for cattle shall be driven out of the hundred, rape, wapentake or lathe where such distress is or shall be taken, except it be to a pound overt within the shire, not above three miles from the place where the distress is taken (*l*). It has been recently held, on the construction of this provision, that the distress may be driven to any pound within the hundred, rape, wapentake, or lathe where it is taken; and that it matters not how far that pound may be from the place where the distress is taken; and if the party distraining chooses to take the distress to a pound outside the hundred, rape, wapentake, or lathe where it is taken, he may do so only if the pound is a pound overt in the

(*g*) Co. Litt. 161 a.

(*h*) *Green v. Duckett* (1883), 11 Q. B. D. 275.

(*i*) A distinction of significance existed between a pound overt which was a common pound and to which all persons had access, and a pound covert which was a private pound.

(*k*) As to replevin proceedings, see 51 & 52 Vict. c. 43, ss. 133—137.

(*l*) 1 & 2 Ph. & M. c. 12, s. 1.

same shire as that in which, and not more than three miles from the place where, the distress was taken (*m*).

The person who impounds animals taken *damage feasant* must supply sufficient food for them while in the pound (*n*). He may recover the expense of the feeding from the owner (*o*). Any person may feed animals in a pound if they have been without food for twelve consecutive hours ; and may recover the expense from the owner (*p*).

Action for Damages.—An action for trespass may be brought for the straying of animals on to the plaintiff's land. But the plaintiff may not bring his action so long as the animals are retained under a distress *damage feasant* (*q*).

If a man places animals upon his land and fails to retain them there, so that they stray on to his neighbour's land, he is liable to that neighbour for all damage occasioned by the animals. It is no defence to raise a case of negligence against the neighbour ; for if there is an obligation upon the owner of the land on which the animals were enlarged, to keep them in—as there is in every case where there is not some special obligation on the neighbour to maintain the fence—then, if the animals escape on to the neighbour's land it constitutes a trespass irrespective of any question of negligence whether great or small (*r*).

Driving out Straying Animals.—Where a man is under no obligation to repair—which is always the case

(*m*) *Coaker v. Willcocks*, [1911] 1 K. B. 649 (*per* DARLING, J., at p. 655) ; affirmed, [1911] 2 K. B. 124. See also *Berdsley v. Pilkington* (1588), Gould. 100.

(*n*) Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 5.

(*o*) Cruelty to Animals Act, 1854 (17 & 18 Vict. c. 60), s. 1.

(*p*) 12 & 13 Vict. c. 92, s. 6 ; 17 & 18 Vict. c. 60, s. 1.

(*q*) *Boden v. Roscoe*, [1894] 1 Q. B. 608, at p. 611.

(*r*) See *Ellis v. Loftus Iron Co.* (1874), L. R. 10 C. P., at p. 12 (Lord COLERIDGE, C.J.).

unless he has bound himself by covenant to repair (*s*), or unless there is a *quasi*-prescriptive obligation upon him to fence (*t*)—he is justified in driving out animals which have wrongfully been allowed to stray upon his land ; and he may even drive them out on to a highway. If, however, he is under an obligation to maintain the fence through which the cattle have strayed, he is not justified in driving the cattle on to a highway and leaving them there, but must drive them back into the close from which they have escaped through his own default (*v*).

Animals Straying from a Close where they ought not to have been.—Where a man's animals are wrongfully in a close, and by reason of a defect in the fence which the defendant in possession of the adjoining close ought to have maintained, the animals escape into that adjoining close, the defendant is not liable in an action by the owner of the animals for injuries sustained by the animals in their escape into the defendant's close (*y*). On the contrary, it seems that the defendant, as we have called him, may maintain trespass against the owner of the animals although their escape into his close was due to his default in not repairing the fence (*z*). The reason for this is that the defendant's obligation is confined to fencing against animals on the adjoining close and not as against animals which have wrongfully strayed into that close (*a*).

(*s*) See p. 97, *ante*.

(*t*) See p. 100, *ante*.

(*x*) *Carruthers v. Hollis* (1838), 8 A. & E. 113.

(*y*) This seems to follow from the dictum of WILMOT, C.J., in *Anonymous Case*, 3 Wils. K. B. 126, viz. : "If a man turn his cattle into Blackacre, where he has no right, and they escape and stray into my field for want of fences, he cannot excuse himself, or justify for his cattle trespassing in my field." See also *Ricketts v. East and West India Docks Rail. Co.* (1852), 12 C. B. 160.

(*z*) *Right v. Baynard* (1674), 1 Freem. K. B. 379 ; cf. F. N. B. (Hale) 298, 4th ed.

(*a*) *Right v. Baynard* (1674), 1 Freem. K. B. 379. See also *Sackville v. Milward* (1444), Vin. Abr. tit. Fences, D. 4 ; *Anonymous Case*, 3 Wilson, K. B. 126.

SECTION 2.—REMEDIES IN THE CASE OF PARTY WALLS (*b*).

Remedies with regard to Party Walls.—Where a party wall is owned by the adjoining owners in tenancy in common, and one co-owner erects something upon the wall, it has been said that the only remedy available to the other co-owner is to remove the obstruction (*c*). It seems to be doubtful whether an action on the ground of trespass is maintainable if one co-owner interfere with the wall (*d*); but there can be no doubt that one co-owner can recover damages against the other if the latter interferes with and injures the wall without the consent of the other co-owner (*e*).

On the other hand, however, if one co-owner remove the wall merely for the purpose of rebuilding it as speedily as possible, it would appear that no action is maintainable by the other co-owner on the ground of trespass (*f*) or on the ground of waste (*g*).

(*b*) The London Building Acts prescribe divers penalties for the non-observance of the statutory provisions as to party wall notices and other matters. These penalties, which in general do not prejudice the common law rights of adjoining owners, are not dealt with here. As to party walls both in and outside the area of those Acts, see Chap. VI., p. 127, *ante*.

(*c*) *Watson v. Gray* (1880), 14 Ch. D. 192; *Cubitt v. Porter* (1828), 8 B. & C. 257, at p. 265.

(*d*) In *Cubitt v. Porter*, *supra*, LITTLEDALE, J., appears to have been of opinion that the ground for the action in such a case would be "waste" and not trespass. See also *Jacobs v. Seward* (1869), L. R. 4 C. P. 328.

(*e*) See *Cubitt v. Porter* (1828), 8 B. & C. 257, at p. 270; *Maysfair Property Co. v. Johnston*, [1894] 1 Ch. 508.

(*f*) *Cubitt v. Porter* (1828), 8 B. & C. 257; *Standard Bank of British South America v. Stokes* (1878), 9 Ch. D. 68, at p. 72.

(*g*) See *Standard Bank of British South America v. Stokes*, *supra*, at p. 72. "With regard to actions in respect to matters not chattels," said LITTLEDALE, J., in *Cubitt v. Porter* (8 B. & C. 257, at p. 268), "in some cases an ejectment will lie, if one actually oust his companion of the possession, and trespass will lie where there has been a complete and total destruction of the subject-matter of the tenancy in common; as if one tenant in common destroys the

We have already pointed out that one co-owner of a party wall owned in common may bring an action for the partition of the wall into several ownership by longitudinal partition (*h*).

SECTION 3.—REMEDIES FOR THE WRONGFUL CONFUSION OF BOUNDARIES.

Origin of the Jurisdiction to Issue Commissions.—

The origin of the jurisdiction of the Court of Chancery in cases relating to boundaries is involved in much obscurity. Sir W. GRANT, in *Speer v. Cawter* (*i*), gave the following explanation of how the jurisdiction had arisen: "There are two writs in the register," he said, "concerning the adjustment of controverted boundaries, from one of which it is probable that the exercise of the jurisdiction of the Court of Chancery took its commencement. The first is the writ *de rationabilibus divisis*, the other, the writ *de perambulatione faciendâ* (*k*). Both Lord NORTHINGTON

whole flight of a dove-cote, or all the deer in their park. In other cases where there has not been a total destruction of the subject-matter of the tenancy in common, but only a partial injury to it, waste or an action on the case will lie by one tenant in common against another."

(*h*) See p. 132, *ante*. See also *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508; *Watson v. Gray* (1880), 14 Ch. D. 192, at p. 195.

(*i*) (1817), 2 Meri. 410.

(*k*) The writ *de rationabilibus divisis* (abolished by 3 & 4 Will. 4, c. 27, s. 36), was in its nature a writ of right, and lay properly where two men had lands in divers towns or hamlets, so that the one was seised of the land in the one town or hamlet, and the other of the land in the other town or hamlet, and they did not know the bounds of the towns or hamlets, which was the land of the one and which was the land of the other. Then to set the bounds in certainty, this writ lay for the one against the other. See Fitzherbert's *Natura Brevium*, 128. The writ *de perambulatione faciendâ* (also abolished by 3 & 4 Will. 4, c. 27) lay where parties were in doubt of the bounds of their lordships or towns; in which case, they might by assent sue out this writ, directed unto the sheriff, to make the perambulation, and to set the boundaries and limits between them in certainty. Such commission was often granted to make perambulation of three or

and Lord THURLOW, without referring to this writ or commission as the origin of the jurisdiction of the Court, have yet expressed an opinion that consent was the ground on which it had been first exercised. The next step would probably be to grant the commission on the application of one party who showed an equitable ground for obtaining it, such as that a tenant or copyholder had destroyed or not preserved the boundaries between his own property and that of his lessor or lord ; and to its exercise on such equitable ground, no objection has ever been made."

In *Wake v. Conyers* (1), the defendants were the proprietors of the manor of Epping, and also of certain freehold lands adjoining thereto, but lying in the manor of Waltham. The plaintiff was the proprietor of the manor of Waltham. The boundary line of the two manors passed through the defendant's park. The bill alleged that the defendants had cut down and destroyed the boundary marks between the two manors, and prayed for a commission to issue, in order to set out and fix the boundaries between the two manors. The defendants did not consent to the exercise of the jurisdiction. The bill was dismissed because no precedent was produced to show that the Court could entertain a bill of that nature, since the Court had no power to fix the boundaries of legal estates, unless some equity was superinduced by the act of the parties, and further, had no power to issue commissions as of course.

The Court of Chancery indeed, always experienced very great difficulty in granting the commission, as between independent adjoining owners. It has been denied that a Court of Equity could interfere between two independent proprietors, and force one of them to have his rights tried and determined in any other than the ordinary legal mode

four counties, where there was any doubt about the bounds and limits thereof ; and this perambulation so made by assent, bound the parties and their heirs.

(1) (1759), 1 Eden, 331 ; 2 Cox, 360.

in which questions of property were decided (*m*). “On what principle,” asked Sir WILLIAM GRANT, in *Speer v. Crawler* (*n*), “can a Court of Equity interfere between two independent proprietors, and force one of them to have his rights tried and determined in any other than the ordinary legal mode in which questions of property are to be decided? In some cases, certainly, the court has granted commissions or directed issues, on no other apparent ground than that the boundaries of manors were in controversy. In *Wake v. Conyers* (*o*), however, Lord NORTHINGTON held that it was in the case of manors that the exercise of the jurisdiction, which (he says) had been assumed of late, was peculiarly objectionable. He refused either to grant a commission or to direct an issue. So did Lord THURLOW in the case of two parishes (*p*). In the same case of *Wake v. Conyers*, Lord NORTHINGTON says, that in his apprehension the Court has simply no jurisdiction to settle boundaries even of land, unless some equity is superinduced by the act of the parties. I concur in that opinion, and think that the circumstance of a confusion of boundaries, furnishes *per se* no ground for the interposition of the court . . . If the ancient boundaries of the two manors be really unknown, how are commissioners to ascertain them? Or what is to be done if they cannot be ascertained? When it is through the default of a tenant or copyholder that the boundaries are confused, the Court provides for the case of its being impossible to ascertain them, by directing so much of the defendant’s own land to be set out as shall be equal to the quantity originally granted or leased. But because the owner of a manor can no longer find all the wastes that may once have belonged to it, he is not to have the deficiency made good out of his neighbour’s estate.”

(*m*) *Speer v. Crawler* (1817), 2 Meri. 410.

(*n*) *Supra*.

(*o*) *Supra*.

(*p*) *St. Luke’s v. St. Leonard’s* (1794), 2 Anstr. 395.

In *Metcalfe v. Beckwith* (*q*), a bill was brought to settle the boundaries between the manors of D. and S., of which the plaintiff and defendant were respectively the lords, the matter was sent to law for trial, and was there determined, —the bill being in the meantime retained in equity,—but the result of the trial or trials having been that the plaintiff was wholly in the wrong, his bill was in the end dismissed with costs.

A commission would not issue to attain a remote consequential advantage; therefore, where a bill was brought by a rector principally on account of tithes, and incidentally to have a commission to settle the boundaries of the parish and glebe lands, the commission was refused because the plaintiff asked for a commission to ascertain the boundaries of the parish,—upon the presumption that all the land which was found within those boundaries would be tithable to him; this was indeed a *primâ facie* inference, but by no means conclusive; and it was said that there was no instance of the Court ever granting a commission in order to attain a remote consequential advantage (*r*).

A commission would not issue,—at least as between adverse independent proprietors,—unless it were first shown that, without the assistance of the Court, the boundaries could not be found. Therefore, where it appeared that A. (the predecessor in title of the plaintiff) was entitled to the fee simple in four acres of land part of a field containing about five acres, and that the remaining one acre belonged to the Crown, and had been demised for a term of ninety-nine years to a tenant whose interest A. had purchased; and that in 1805 the lease terminated, and the defendant purchased the share and interest of the Crown in the one acre and, through some mistake on the part of A.'s tenant, was let into possession of the whole field, and had since continued to hold, refusing to set out

(*q*) (1726), 2 P. Wms. 376.

(*r*) *Atkins v. Hatton*, 2 Anstr. 386.

the portion of the field belonging to the plaintiff, or to make the plaintiff any compensation, the Court refused to grant a commission to ascertain the boundaries, the Court stating (in effect) that before granting such a commission it was first necessary to show that, without the assistance of the Court, the boundaries could not be found (s).

The Court would not, however, refuse to issue the commission, merely because the confusion had arisen through the neglect of the party seeking the relief, if the case were in other respects proper for a commission to issue. Thus, where the testatrix by her will had appointed the manor of W. to uses under which the plaintiff became entitled as tenant in tail in possession, and had devised her residuary real estate to trustees upon trust to sell; and the trustees sold,—the abstract of title showing that

(s) *Miller v. Warmington* (1820), 1 Jac. & W. 484, in which case it was said by PLUMER, M.R.: "Here the answer admits that the whole field has been held together; the bill states that there are no marks and bounds to distinguish one part from the other; and though there may be none that are visible and apparent to the eye, yet it does not follow that, by addressing themselves to old people acquainted with the place or by examining the tenant, they might not separate the two parts. But even if the difficulty of finding the boundaries were established, it is clear the plaintiff does not stand in a predicament that gives him a right to apply for a commission; for this is a case of persons claiming by adverse title; there is no connection between them, to serve as a foundation for the Court to proceed on in ordering a commission." The learned judge then pointed out that *Speer v. Crawler*, 2 Meri. 410, had settled that a foundation for this species of relief must be lain not merely by showing that the boundaries were confused, but that the confusion had arisen from some misconduct on the part of the defendant, or those under whom he claimed, and which rendered it incumbent on him to co-operate in re-establishing them. "But the Court," he continued, "will not interfere between independent proprietors; and confusion of boundaries *per se* is no ground to support such a bill. . . . And as regards the rest of the bill, that which asks for a commission in the nature of a writ of partition,—partition can only be between the joint tenants, tenants in common, or coparceners, the principle upon which the relief proceeds being the unity and entirety of the possession of each,—hence the plea of *non tenet insimul* is a good defence to an action for partition. . . . Partition is not given for any such reason as confusion of boundaries, but from the nature of the interest of the parties."

parcel of the manor had been wrongly included in the sale,—so that the purchaser had full notice of the plaintiff's title to that part; and it appeared that the error of the trustees had arisen from the boundaries having been confused by the plaintiff's predecessor in title,—the Court held, that the plaintiff was not thereby precluded in equity from establishing his title to a share of the land, and an inquiry was directed to ascertain the boundaries (*t*).

Commissions to ascertain Boundaries of Lands Charged with Rents.—The Court also exercised jurisdiction in cases where distress for rent had become difficult or impossible by reason of the confusion of boundaries. It was said in *Bouverie v. Prentice* (*u*), that if the tenant of lands confounded the boundaries in order to prevent a distress, the lord would be entitled to a commission to ascertain them. This rule seems as applicable to a rent-charge as to a rent-service (*x*).

Where by mere length of time, it has become impossible to know out of what particular lands ancient quit-rents are issuable, the Courts of Equity exercised the jurisdiction, and on proof of payment within a reasonable time, decreed a satisfaction for all arrears of such rents and payment of the same for the future (*y*).

The Plaintiff's Title to an Interest in the Confused Land.—The Court has always required the plaintiff seeking a commission for the ascertainment of boundaries, to establish his title to some interest in some of the land, the boundaries of which have become confused. Thus, where a bill was filed to ascertain and set out the boundaries of lands belonging to the plaintiff, under whom the defendant had held as lessee for a number of years, on the ground

(*t*) *Hicks v. Hastings* (1857), 3 K. & J. 701. See also *Clarke v. Yonge* (1842), 5 Beav. 523.

(*u*) (1778), 1 Bro. C. C. 201.

(*x*) *Bowman v. Yeat* (1660), 1 Ch. Cas. 146.

(*y*) *Bridgewater (Duke of) v. Edwards* (1733), 6 Bro. P. C. 368.

that the defendant had during the lease confused his own lands with those of the plaintiff, so that they could not be distinguished,—it being satisfactorily proved that part of the land in the possession of the defendant belonged to the plaintiff, the bill was dismissed (a). And when the court was satisfied with the plaintiff's title, and that he had an equitable ground for the assistance of the court, the authorities justified the affording of relief either by a commission or by directing an issue, as would best advance the justice of the particular case (b).

Advantages of Commissions over the Old Method of Directing Issues.—"Where the question," said Lord BROUGHAM, in *Godfrey v. Littell* (c), "is one involving a mere positive affirmation on the one hand, or a negation on the other, an issue is the fitter and more convenient course. But where the object of the inquiry is to ascertain how much of the land has been retained by the defendant, and in what direction, and if the part retained cannot be exactly ascertained, to determine whether any and what compensation should be made to the plaintiff, the investigation is much more easily and properly conducted by a commission, composed partly of learned persons, and partly of surveyors perambulating upon the spot, than before a jury, amidst the hurry and inaccuracy necessarily incident to a trial at Nisi Prius."

Some Instances where Commissions have Issued.—Commissions have issued, at suit of the Crown, in cases of an encroachment upon the shore or bed of the sea, or upon the bed of a tidal river (d). Commissions have issued to settle the boundaries of part of a manor, where

(a) *Godfrey v. Littell* (1829), 1 R. & M. 59 ; 2 R. & M. 639.

(b) *Ibid.*

(c) (1831), 2 R. & M. 630, at pp. 636, 637.

(d) *Att.-Gen. v. Chamberlaine* (1857), 4 K. & J. 292 ; *Att.-Gen. v. St. Aubyn* (1810), Wightw. 167 ; *Hicks v. Hastings* (1857), 3 K. & J. 707.

the plaintiff has established his title to the other part, that being in the nature of a petition (*e*).

Commissions to Save Multiplicity of Suits.—A commission has issued in order to save a multiplicity of suits, where one general right was claimed against a number of defendants, all of whose interests, although they were separate and distinct, were of such a nature that the trial of the right of one amounted to the trial of the rights of all (*f*). Thus, where the lord of a manor filed a bill against more than thirty tenants of his manor—freeholders, copyholders and leaseholders—who owed their rents, but had so confused their boundaries that he could not distrain for the rents, and he prayed a commission to ascertain the boundaries, a decree was made accordingly because the plaintiff claimed one general right, for the assertion of which it was necessary to ascertain the several tenements (*g*).

But a commission was refused where it was sought for the purpose of ascertaining the boundaries between two parishes in a case where the ascertainment was desired for the purpose of settling a question as to the poor rates belonging to each parish (*h*).

Commissions in Cases of Trustees Confusing their Lands with those of their Cestui Que Trustent.—Where a trustee confounded his *cestui que trust's* lands with his own, equity would issue a commission at the suit of the *cestui que trust* to distinguish his property from that of the trustee. Thus, where the defendant was in possession as beneficial owner of lands, both freehold and copy-

(*e*) *Webb v. Banks* (1760), 2 Eq. Ca. Abrid. 164, A. 30.

(*f*) *Wake v. Conyers* (1759), 1 Eden, 331. Cf. also *Phillips v. Hudson* (1867), L. R. 2 Ch. 243.

(*g*) *Magdalen College v. Athill*, Mitford, Eq. Pl. 183. See also *Whaley v. Dawson* (1805), 2 Sch. & Lef. 367, 370.

(*h*) *St. Luke's v. St. Leonard's* (1794), 1 Bro. C. C. 40 ; 2 Anstr. 395. See also *Marquis of Bute v. Glamorganshire Canal Co.* (1846), 1 Ph. 681 ; *Woolaston v. Wright* (1797), 3 Anstr. 801 ; *Cowper v. Clarke* (1732), 3 P. Wms. 157.

hold, and these lands were intermixed with other lands of which he was also in possession, but as trustee of a charity—a commission was issued to distinguish and set out the charity lands from those of the defendant (*i*).

Commissions in Favour of Creditors.—A commission was issued at the instance of an execution creditor and in aid of his writ of *elegit*, to set out lands that lay promiscuously (*k*).

Commissions to Ascertain the Boundaries of Copyhold and Leasehold Tenements.—As we have already pointed out (*l*), copyholders and leaseholders are under an obligation to preserve the boundaries of their respective tenements. Thus, where the plaintiff was lord of the manor, and the defendant and his ancestors had for many years past been possessed of compounded and uncompounded copyhold premises and of freehold lands within the manor, and the boundaries between the different estates had become confused, a commission issued to distinguish the copyhold lands from the freehold lands, and the uncompounded copyholds from the compounded copyholds, and to ascertain and set out the boundaries, and, if they could not be distinguished, to set out lands of the tenant of equal value (*m*).

Where a copyhold tenement had been enfranchised, and the boundaries had been confused prior to, and remained confused after, the enfranchisement, and the lord of the manor desired that the boundaries should be ascertained, in order that he might recover more readily the arrears of

(*i*) *Att.-Gen. v. Bowyer* (1800), 3 Ves. 714 ; 5 Ves. 300.

(*k*) *Mullineux v. Mullineux* (1616), Toth. 39 (ed. 1649).

(*l*) See p. 148, *ante*.

(*m*) *Leeds v. Strafford* (1798), 4 Ves. 180. See also *Rous v. Barker* (1725), 4 Bro. P. C. 660 ; *Clayton v. Cookes* (1742), 2 Atk. 449 ; *Wintle v. Carpenter* (1680), Rep. t. Finch, 462 ; *Peckering v. Kimpton* (1653), 5 Car. 2, Toth. 101 ; *Darenport v. Bromley* (1672), Rep. t. Finch, 17 ; *Lord Abergavenny v. Thomas* (1739), West, 649.

a certain rent-charge created on the enfranchisement, the court held that the enfranchised tenement was liable for the continuing confusion of the boundaries, because it was clear that, at the date of the enfranchisement, the court would have made an order, on the application of the lord, to ascertain the boundaries of the lands (*n*).

With reference to the liability of a leaseholder to preserve his boundaries, it has been long settled, that a tenant undertakes amongst other obligations resulting from the relation of landlord and tenant, an obligation to keep distinct from his own property during his tenancy and to leave clearly distinct at the end of it, his landlord's property, not in any way confounded with his own (*o*). If the tenant fails to do so, a commission will issue to inquire what were the lands of the landlord if the tenant has so confounded the boundaries, by sub-dividing the land by hedges and stones, and by destroying the metes and bounds, that the landlord's land cannot be ascertained, the court will inquire as to the value of the landlord's estate, valued fairly, but to the utmost as against the tenant, who has himself destroyed the possibility of the landlord's having his own (*p*).

This relief will be granted at the suit of the landlord not only against the tenant himself, but also against all persons claiming under him, either as volunteers or as purchasers, and whether with or without notice ; but it must be shown that the portion of the land of which the tenant is in possession is the specific land originally demised or part thereof (*q*).

(*n*) *Searle v. Cooke* (1889), 43 Ch. D. 519.

(*o*) *Att.-Gen. v. Fullerton* (1813), 2 V. & B. 263 ; *Aston v. Exeter* (1801), 6 Ves. 292.

(*p*) *Att.-Gen. v. Fullerton* (1813), 2 V. & B. 263 ; *Grierson v. Eyre* (1802), 9 Ves. 345. See also *Glynn v. Scowen* (1675), Rep. t. Finch, 239 ; *Willis v. Parkinson* (1817), 2 Meri. 507 ; *Godfrey v. Littel* (1829), 1 R. & M. 59 ; 2 R. & M. 630.

(*q*) *Att.-Gen. v. Stephens* (1854), 24 L. J. Ch. 694 ; 25 L. J. Ch. 888 ; 1 Kay & J. 724 ; 6 De G. M. & G. 111.

A tenant will not be relieved from his liability in respect of a confusion of boundary, by the fact that the boundary was confused by some previous holder of the lands ; for it is the tenant's duty to have the landlord's property at all times distinguishable from his own, when the landlord requires it (*r*).

Each of several co-lessees is under an obligation not only not to intermix the lands, but also not to suffer that intermixture by his co-lessees,—the obligation attaching upon each in respect of all. They have one interest as the lessees of their landlord, and that interest is connected with a duty which rests upon them all, that each and every of them shall not bring into difficulty the title to the lands (*s*).

In all such cases as those which we have considered above, the court grants the landlord a commission instead of driving him to an ejectment ; for the tenant's possession would give him an unfair advantage in the latter species of remedy (*t*).

Moreover, the obligation of a tenant to keep distinct, from his own property, his landlord's property rests on him during the subsistence of the term, because the landlord does not lose his interest in the property during the demise, but retains the very important right of having his tenant keep up some clear and sufficient boundary, which will render the two properties clearly distinct : Thus, where the plaintiff and defendant were adjoining owners, and their lands were separated by a ditch and a bank, and on the top of the bank was a post and rail fence ; and the defendant (or his predecessor in title) had obtained from the plaintiff (or his predecessor in title) a lease of portion of the plaintiff's land ; and shortly after the grant of the lease, the defendant (or his predecessor) had removed the

(*r*) *Att.-Gen. v. Stephens* (1854), 1 Kay & J. 744.

(*s*) *Willis v. Parkinson* (1817), 1 Swans. 9 ; 2 Meri. 507.

(*t*) *Rous v. Barker* (1725), 4 Bro. P. C. 660 ; *Att.-Gen. v. Fullerton* (1813), 2 V. & B. 263.

post and rail fence, levelled the bank and filled up the ditch,—the court held the case to be a proper one for the issue of a commission for the purpose of ascertaining the boundaries between the defendant's own proper land and the demised lands (*u*).

Present-day Applications for Commissions. — We have given the general principles by which the Courts of Equity were guided in the exercise of their jurisdiction of issuing commissions to ascertain boundaries which had become confused. That jurisdiction has now, of course, become vested in the High Court ; but it has not been restricted. Yet notwithstanding this, modern cases where commissions have issued are rare. This is probably due to the divers statutes now supplying methods of adjusting and ascertaining boundaries (*x*).

It would now appear that where a case has been made out for the ascertainment of a confused boundary by the court, an inquiry in chambers is a more convenient form of relief than the issue of a commission (*y*).

(*u*) *Spike v. Harding* (1878), 7 Ch. D. 871.

(*x*) See pp. 159 *et seq.*; and pp. 190 *et seq.*, *ante*.

(*y*) See *Spike v. Harding*, *supra*.

INDEX.

A.

ABATEMENT

as against receiver appointed by the court, 213.
remedy of, 211.

ACCESS

to water, riparian owner's right of fishing does not depend
on, 59.
riparian owner's rights based on, 50.

ACCESSORIAL RIGHTS,

acquisition of, in watercourses, 56.
distinguished from natural rights, 5, 69.
in natural watercourses, 51.
meaning of phrase, 5.
natural waters, in, 55, 56.
of support, 77 *et seq.*
to pollute water, 56.
See EASEMENT; PROFIT A PRENDRE.

ACCRETIONS,

effect on ownership, 44 *et seq.*

ACORNS,

right to take, a *profit à prendre*, 13.

ACQUISITION

of easements of support, 79 *et seq.*

ACTS OF OWNERSHIP, 20, 33—35, 181, 183, 232 *et seq.*, 244.

admissibility of evidence of, in proof of boundaries, 244.
granting leases, how far evidence of, 232 *et seq.*
rebuttal of presumption of ownership of soil of highway
by proof of, 181.
to establish title to foreshore, 33—35.
wayside strips, 183.

ADJOINING OWNERS,

rights of, with regard to party structures in London, 141.

AFFIRMATIVE EASEMENTS,

examples of, 9, 10.

INDEX.

ALLOTMENTS,

fencing, under Inclosure Acts, 196.

ALLUVION,

doctrine of, 44 *et seq.*

ALTERATION

of river bed, effect on ownership, 43 *et seq.*

ANIMALS,

escape of, through fences, remedies for, 246 *et seq.*

owner must fence in his, 96, 97.

straying upon land, owner may drive out, 248.

See also CATTLE.

“APPENDANT,”

meaning of, 12.

APPORTIONMENT

of rents, adjustment of boundaries under Inclosure Acts
on, 174.

ARTIFICIAL WATERCOURSES

for temporary purposes, no prescriptive right in, 57, 58.

rights in, 57, 58.

riparian owner may have natural rights in, 58.

AWARDS,

maps annexed to inclosure, how far admissible as evidence,
237.

whether admissible as evidence in boundary cases, 231.

B.

BARBED WIRE,

adjoining highway, prohibition against, 194.

BARRIERS

in mines, rights in respect of, 119 *et seq.*

BATHING,

public have no right of, on foreshore, 32.

BED,

alteration of river, effect on ownership, 43 *et seq.*

of river or stream, whether, passes on grant of a piscary, 62.

presumption of ownership of, in case of several
fishery, 61.

separately owned, rights of fishing where, 59.

of “running silt,” right of support from, 75.

INDEX.

BLACKSTONE,

statement by, as to origin of parishes, 155.

BOARD OF AGRICULTURE AND FISHERIES,

ascertainment of boundaries by, under Inclosure Acts, 171
et seq.
copies of proceedings before, how far admissible as
evidence, 241.
jurisdiction of, in adjustment of boundaries, 160 *et seq.*

BOUGHS. *See* BRANCHES.

BOUNDARIES,

adjustment of—

jurisdiction of Board of Agriculture in, 160 *et seq.*
of parochial and other areas under Land Drainage
Acts, 159, 160.

on apportionment of rents under Inclosure Acts, 174.
under Land Drainage Acts, 159, 160.

Tithe Commutation Acts, 160 *et seq.*

apportionment of tithe rent-charge on alteration of, 163, 164.
ascertainment of—

by Board of Agriculture under Inclosure Acts, 171
under Inclosure Acts, 171 *et seq.* *et seq.*

Local Government Acts, 164—171.

commissions for ascertainment of, 251 *et seq.*

to ascertain, present-day applications for, 262.

evidence of. *See* EVIDENCE.

obligation on tenant to preserve, of tenement, 148, 149.

of copyhold and leasehold tenements, commissions for as-
certainment of, 259 *et seq.*

evidence of, 244.

glebe, ascertainment of, 162, 163.

highway authority areas, to facilitate repairs of highways,
parishes, generally, 155 *et seq.* 175, 176.

“place,” ascertainment of, under Public Health Act,
1875, 164.

registered land, 198 *et seq.*

several fisheries in non-tidal waters, 62.

trees on, ownership of, 204 *et seq.*

water, 28 *et seq.*

See also BOUNDARY.

BOUNDARY,

definition, 2.

of parish, presumption that *medium filum* of highway is, 158.

ownership of fruit and branches fallen over, 214 *et seq.*

perambulation of parish, 159.

transmutation of ownership on shifting of water, 44 *et seq.*

trees overhanging, may be cut, 210.

See also BOUNDARIES.

BRANCHES,

Crown grant of right to lop, 215.

no easement for overhanging, 207 *et seq.*

INDEX.

BRANCHES—*continued*.

overhanging, may be a nuisance, 209.
right of taking, a *profit à prendre*, 12, 13.
when notice ought to be given before cutting overhanging,
211 *et seq.*

"BUILDING OWNER,"

definition of, in London Building Acts, 136.
remedies of, under London Building Acts, 144 *et seq.*
rights of, with regard to party-structures, under London
Building Acts, 138 *et seq.*

BUILDINGS,

easement of support for, prescriptive claims to, 81.
of, from buildings, 78.
intended, implied grant of easement of support for, 79.
support for, from land, accessorial right of, 75, 76.
no natural right of, 75, 76.
of, from land, easement of, 78.
from buildings, no natural right of, 76, 77.

C.

CANALS,

rights of support for, 88.

CATTLE,

escape of, through fences, remedies for, 246 *et seq.*
owner must fence in his, 96, 97.
riparian owner's right of using water for, 52.
straying upon land, owner may drive out, 248.

CAUSE OF ACTION,

when each successive subsidence gives rise to fresh, 73, 74.
it arises in cases of support, 72, 73.

COMMISSIONS

for ascertaining boundaries, 251 *et seq.*
to ascertain boundaries of lands charged with rents, 256.
present-day applications for, 262.

COMMISSIONERS OF SEWERS, 62—68.

jurisdiction of, 65, 66.

COMMON,

obligation to fence against a, 98 *et seq.*
of fishery, 60.
pur cause de voisinage, 99.
tenancy in, of fence, 95.

COMMON LAW,

no obligation to fence at, 95 *et seq.*

INDEX.

CONSUMPTION

of water, riparian owner's right to, 52—54.

See RIPARIAN OWNER.

CONTEMPORANEA EXPOSITIO,

doctrine of, 224.

CONTRIBUTION

towards expense of heightening party-walls under London Building Acts, 147.

CONVEYANCE

of land adjoining highway, presumption that moiety of highway is included in, 180.

riparian land includes bed of non-tidal river *ad medium filum aquæ*, 42.

See also PRESUMPTION.

COPYHOLDS,

ascertainment of, when intermixed with freeholds, 174.

boundaries of, evidence of, 244.

commissions for ascertainment of boundaries of, 259 *et seq.*

COSTS

of orders for inspection of mines, 126.

COURT,

abatement against receiver appointed by, 213.

COVENANT,

purported grant of easement may operate as a, 15.

re-entry on breach of, to repair fence, 152.

to fence does not run with the land, 97.

words in form of, may operate as grant of easement, 15.

“CROSS-WALL,”

definition of, in London Building Acts, 135.

CROWN,

bed of tidal river *primâ facie* vested in, 39, 40.

duty of, to prevent inroads of the sea, 62, 63.

grant by, of right to lop branches, 215.

soil of sea-bed how far vested in, 29, 30.

surveys and extents by, how far admissible as evidence, 238 *et seq.*

CUJUS EST SOLUM EJUS EST USQUE AD INFEROS, 3.

CUSTOM,

rights *in alieno solo* exercisable by, effect of recession of sea on, 37.

CUSTOMARY RIGHT *IN ALIENO SOLO*, 7.

INDEX.

D.

DAMAGES

- for subsidences in respect of mines, 123.
- successive subsidences in support cases, 73, 74.

DECLARATIONS

- of deceased persons against interest, admissible as evidence, 242.

DEDICATION

- of highways, 179.
- rights of navigation in non-tidal rivers, 43.

DEEDS,

- contemporanea expositio* to interpret, 224.
- rectification of, 223.

DEFINITION

- of "affirmative easement," 8.
- "building owner" in London Building Acts, 136.
- "cross-wall" in London Building Acts, 135.
- "dominant tenement," 8.
- "easement," 7.
- "external wall" in London Building Acts, 134.
- "foreshore," 29.
- "minerals," 12, 12 n.
- "negative easement," 8.
- "party-fence-wall" in London Building Acts, 136.
- "party-structure" in London Building Acts, 136.
- "party-wall," 127.
- "*profit à prendre*," 7.
- "sea bed," 28, 29.
- "servient tenement," 8.

DERELICTION,

- meaning of term, 45 n.

DISTRESS

- damage feasant*, 246 *et seq.*

DITCH,

- presumption that owner of fence owns, 94.

DOCUMENTS. *See also* PARCELS.

- general rules as to admissibility of evidence in construing, 218 *et seq.*

DOMESDAY BOOK,

- entries in, admissible in evidence, 241.

INDEX.

DOMINANT TENEMENT,
definition of, 8.

E.

EASEMENT,

- affirmative, definition of, 8.
 - examples of, 9, 10.
- claim to, under Prescription Act, 24 *et seq*
- creation of, 13 *et seq*.
- deed necessary for creation of, 14.
- definition of, 7.
- equitable right to, 14.
- examples of, 8—10.
- examples of affirmative, 9, 10.
 - negative, 10, 11.
- grant of, by words in form of covenant, 15.
- implied grant of, 15 *et seq*.
- negative, definition of, 8.
 - examples of, 10, 11.
- no particular form of words necessary for grant of, 14.
- none for overhanging branches, 207 *et seq*.
 - roots, 207 *et seq*.
 - in gross, 8.
- of necessity, light easement is not an, 17.
 - vagueness of term, 16.
 - whether an easement of support is an, 17.
- support, acquisition of, 79 *et seq*.
 - for buildings from buildings, 76—78.
 - land, 75—78.
 - prescriptive claims to, 81.
 - party-wall, 129.
 - implied grant of, 79 *et seq*.
 - for intended building, 79.
 - statutory acquisition of, 82.
 - where within Prescription Act, 81, 82.
- presumed grant of, 17.
- purported grant of, may operate as a covenant, 15.
- servient owner cannot insist on continuance of, 56.
- varieties, 8—10.

EJECTMENT

in respect of party-wall, 131.

ENCROACHMENTS

on highway, prevention of, 190 *et seq*.

ENJOYMENT,

essentials of prescriptive, 26.
secret, prevents prescriptive acquisition, 81.

INDEX.

EQUITABLE RIGHT

to easement, 14.

ESTOPPEL

after purported creation of easement, 14.

EVIDENCE,

acts of ownership, of, admissibility in boundary cases, 244.
awards, whether admissible as, in boundary cases, 231.

Board of Agriculture, how far copies of proceedings before,
admissible as, 241.

contemporanea expositio, doctrine of, 224.

declarations of deceased persons against interest admissible
as, 242.

Domesday Book, admissible as, 241.

Down Survey, how far admissible in, 242.

extrinsic, meaning of, 217, 218.

general rules as to admissibility of, in construing documents,
218 *et seq.*

granting leases, how far, of ownership, 232 *et seq.*

intrinsic, meaning of, 217, 218.

land tax assessments, admissible as, 243.

maps annexed to inclosure awards, how far admissible
as, 237.

how far admissible as, of boundaries, 235.

of acts of ownership, 232 *et seq.*, 244.

boundaries of copyholds, 244.

reputation, admissibility of, 225.

admitted in boundary cases, 226 *et seq.*

ordnance surveys, how far admissible as, 242.

perambulations how far, of boundaries, 243.

poor rate assessments, admissible as, 243.

terriers, how far admissible as, 240.

tithe maps, how far admissible as, 237 *et seq.*

EXCAVATIONS,

common law obligation to fence, 109 *et seq.*

near highway, common law obligation to fence, 110 *et seq.*

no obligation to fence ancient, near highways, 112.

in favour of trespassers, 111.

EXTENTS,

Crown, how far admissible as evidence, 238 *et seq.*

“EXTERNAL WALL,”

definition of, in London Building Acts, 134.

F.

FALSA DEMONSTRATIO,

when words rejected as, 221 *et seq.*

INDEX.

FENCE,

- abandoned mines, statutory obligation to, 116.
- barbed wire in, adjoining highway, prohibition against, 194.
- common law obligation to, excavations, 109 *et seq.*
- defective state of, when landlord liable for, 150.
- duty of tenant to repair, 149 *et seq.*
- erection of, by highway does not make owner liable to repair, 187.
- express obligation to, 97, 98.
- mines, statutory obligations to, 116 *et seq.*
- no obligation to, ancient excavations near highways, 112.
 - at common law, 95 *et seq.*
- obligation to, against a common, 98 *et seq.*
 - shafts near highways, 118.
- ownership of, 92 *et seq.*
- prescriptive obligations to, 100 *et seq.*
 - discussion of the authorities on, 104 *et seq.*
 - unknown origin of, 101.
- presumption that highway extends from fence to, 177.
 - how rebutted, 178.
- presumption that owner of, owns ditch, 94.
- railways, statutory obligation to, 113 *et seq.*
- remedy for default in repairing, 152 *et seq.*
- repair of, 95 *et seq.*
- tenancy in common of, 95.
- whether lost modern grant of obligation to, can be presumed, 103.

FENCES, 92 *et seq.* See FENCE.

FISHING,

- no public right of, in inland non-tidal lake, 49.
 - in non-tidal rivers, 41.
 - waters, 58.
- public right of, in tidal rivers, 40.
- rights of, evidence of ownership of foreshore, 33, 34.
 - in gross, 60.
 - in non-tidal waters, 51—62.
 - where bed of river owned separately from banks, 59.
- riparian owner, right of, 59.

FLOW,

- accessorial right to alter, 56.
- riparian owner's right to preservation of, 55.

FORESHORE,

- acts of ownership on, 33—35.
- definition of, 29.
- ownership of, 30 *et seq.*
 - by a subject, 32 *et seq.*
- ownership of land abutting on, 35, 36.
- presumed grants of, by Crown, 32 *et seq.*
- primâ facie, extra-parochial, 38, 39.

INDEX.

FORESHORE—*continued.*

- public rights over, 31, 32.
- rights of fishing, evidence of ownership of, 33, 34.
- right to wreckage, evidence of ownership of, 33, 34.
- shifting limits of, 36—38.
- whether title to, can be acquired under Statutes of Limitation, 35.

“FREE” FISHERY, 60. *See* FISHING.

FRUIT

- fallen over boundary, ownership of, 214 *et seq.*

G.

GLEBE,

- ascertainment of boundaries of, 162, 163.
- terriers of, how far admissible as evidence, 240.

GRANT

- by Crown, of right to lop branches, 215.
- implied, of easements, 15 *et seq.*
- of easement may operate as covenant, 15.
- pleading lost modern, 23, 24.
- prescription presupposes a, 27, 103.
- presumed, of easements, 17.
- presumption of lost, since 1189, 22 *et seq.*
- whether lost modern, of obligation to fence can be presumed, 103.

See also IMPLIED GRANT.

GRANTEE,

- prescription presupposes a competent, 27.

GRANTOR,

- prescription presupposes a competent, 27.

GROSS,

- no easement in, 8.
- profit à prendre* in, 11.
- right of fishing in, 60.

H.

HEDGES,

- prejudicial effect of, protection of highway from, 191 *et seq.*
- See* FENCE.

HIGHWAY,

- barbed wire adjoining, prohibition against, 194.
- erection of fence by, does not make owner liable to repair, 187.

INDEX.

HIGHWAY—*continued.*

- excavations near, common law obligation to fence, 110 *et seq.*
- nature of a, 178.
- no obligation to fence ancient excavations near, 112.
- obligation to fence shafts near, 118.
- power of making temporary road pending repair of, 187.
- presumption as to ownership of soil of, 179.
 - that, extends from fence to fence, 177.
 - how rebutted, 178.
- prevention of encroachments on, 190 *et seq.*
- protection of, from prejudicial effect of hedges, 191 *et seq.*
 - trees, 191 *et seq.*
- rebuttal of presumption of ownership *ad medium filum*, 181.
- repair of, 187 *et seq.*
 - adjustment of boundaries of area of highway authorities to facilitate, 175, 176.
 - ratione clausulæ*, 189.
 - tenuræ*, 188.
- strips by side of—
 - explanation of frequency of, 184, 185.
 - presumption as to ownership of, 182.
 - rebuttal of, 183.
- trees overhanging, may be cut, 211, 213.
- wayside strips by. *See* STRIPS.

I.

IMPLIED GRANT

- of easements of support, 79 *et seq.*
- easement of support for intended building, 79.
- right to let down surface, 83—85.

INCLOSURE,

- maps annexed to, award, how far admissible as evidence, 237.
- repair of, roads, 186.
- roads, 195 *et seq.*

INCLOSURE ACTS,

- adjustment of boundaries under, on apportionment of rents, 174.
- ascertainment of boundaries under, 171 *et seq.*
 - intermixed copyholds under, 174.

INFRINGEMENT

- of natural right of support, 72.

INLAND LAKE,

- no public right of fishing in non-tidal, 49.
- ownership of soil of, 49.
- public right of navigation in, 49.
- riparian owner's right to embark on, 49.

INDEX.

INLAND WATERS,
classification of, 39.

INSPECTION,
costs of orders for, of mines, 126.
of mines, orders for, 124—126.

INTERPRETATION,
of deeds by *contemporanea expositio*, 224.
parcels, 220 *et seq.*
See EVIDENCE.

IRRIGATION,
riparian owner's right of using water for, 53.

ISLAND,
effect of existence of, on presumption as to ownership of
soil of bed of river or stream, 41 n.

J.

JURISDICTION,
origin of, to issue commissions for ascertainment of bound-
aries, 251.

JUS SPATIANDI,
unknown in English law, 6.

L.

LAKE, INLAND,
no public right of fishing in, 49.
ownership of soil of, 49.
public right of navigation in, 49.
riparian owner's right to embark on, 49.

LAND,
boundaries of registered, 198 *et seq.*
easement of support for buildings from, 78.
support from, for buildings, easement of, 75, 76.
of, by land, 70—74.
supported by water, 74, 75.

LAND DRAINAGE ACTS,
adjustment of boundaries of parochial and other areas
under, 159, 160.

LAND TAX,
assessments, how far evidence of boundaries, 243.

INDEX.

- LAND TRANSFER ACT, 1875,**
provisions of, as to boundaries of registered land, 200.
- LAND TRANSFER ACT, 1897,**
provisions of, as to boundaries of registered land, 200.
- LANDLORD,**
when liable for defective state of fence, 150.
- LEASEHOLDS,**
commissions for ascertainment of boundaries of, 259 *et seq.*
- LEASES,**
granting of, how far evidence of ownership, 232 *et seq.*
- LEGAL MEMORY,**
commencement of, 21.
no presumption that highway was made before commencement of, 180.
- LIABILITY**
for negligence in removal of party-wall, 130.
- LIGHT,**
claims to easements of, under Prescription Act, 24.
easement of, not an easement of necessity, 17.
- LIMITATION, 18 *et seq.***
distinguished from prescription, 18.
statutes of. *See* STATUTES OF LIMITATIONS.
- LOCAL GOVERNMENT ACTS,**
ascertainment of boundaries under, 164—171.
- LONDON BUILDING ACT, 1894, 133 *et seq.***
- LONDON BUILDING ACTS,**
contribution towards expense of heightening party-walls under, 147.
definition of “cross-wall” in, 135.
 “external wall” in, 134.
 “party-fence wall” in, 136.
 “party-structure” in, 136.
 “party-wall” in, 134.
 “party-arch” in, 136.
party structures, rights with regard to, under, 141.
 wall notice under, 141—143.
 walls outside area of, 127—133.
 within area of, 133 *et seq.*
provisions regulating the building of party-walls in, 137 *et seq.*
remedies of building owners under, 144 *et seq.* *seq.*
rights of building owners with regard to party-structures under, 138 *et seq.*
underpinning walls under, 143, 144.

INDEX.

M.

MAPS

- annexed to inclosure awards, how far admissible as evidence, 237.
- Ordnance survey, how far admissible as evidence, 242.
- tithe, how far admissible as evidence, 237 *et seq.*
- when admissible as evidence of boundary, 235.

MINERALS,

- definition of, 12.

MINES,

- abandoned, statutory obligations to fence, 116.
- barriers in, rights in respect of, 119 *et seq.*
- damages for subsidences in respect of, 123.
- inspections of, orders for, 124—126.
- remedies for wrongs done in respect of, 123 *et seq.*
- statutory obligation to fence, 116 *et seq.*
- water artificially brought into, rights as to, 121.
 - gravitating in, rights as to, 120.

N.

NATURAL RIGHT

- for lateral support for land unweighted by buildings, 70, 71.
 - vertical support of land unweighted by buildings, 70, 71.
- meaning of phrase, 5.
- none, for support of buildings, 75, 76.
- of freedom from noxious gases, 4.
 - support for buildings from buildings, none, 76, 77.
 - land, none, 75, 76.
 - infringement of, 72.
 - none for land weighted by buildings, 70, 71.

NATURAL RIGHTS

- distinguished from accessorial rights, 5, 69.
- riparian owner's, in natural watercourse, 51 *et seq.*
- to freedom from undue noise, 4.

NATURAL WATERCOURSE

- accessorial rights in, 55, 56.
- riparian owner's rights in, 51 *et seq.*

NAVIGATION,

- dedication of rights of, in non-tidal rivers, 43.
- public right of—
 - in inland lake, 49.
 - non-tidal rivers, 41, 43.
 - tidal rivers, 40.
- right of, 6.

INDEX.

NEGATIVE EASEMENTS,
examples of, 10, 11.

NEGLIGENCE
in removing party-wall, liability for, 130.

NOISE,
right to freedom from, 4.

NON-TIDAL,
no public right of fishing in, waters, 58.
river or stream, separate ownership of the bed of, 59.

NON-TIDAL WATERS,
rights of fishing in, 58—62.

NOTICE,
party-wall, under London Building Acts, 141—143.
when necessary before cutting overhanging branches,
211 *et seq.*

NOXIOUS GASES,
right to freedom from, 4.

NUISANCE
caused by overhanging branches, 209.
obstruction in tidal river a public, 40.
trees overhanging highway may be a, 211.

O.

OBLIGATION,
express, to fence, 97, 98.
to fence against a common, 98 *et seq.*
excavations near highway at common law, 110 *et seq.*

OWNER,
removal of part of party-wall by a several, 128.

OWNERSHIP,
acts of, 20.
See ACTS OF OWNERSHIP ; EVIDENCE.
on foreshore, 33—35.
change of, on recession of sea, 36, 37.
effect of encroachments of sea on, 37, 38.
of bed of tidal river *primâ facie* vested in Crown, 39, 40.
fence, 92 *et seq.*
foreshore, 30 *et seq.*
right of fishing, evidence of, 33, 34.
to wreckage is evidence of, 33, 34.

INDEX.

OWNERSHIP—*continued.*

- of fruit and branches fallen over boundary, 214 *et seq.*
- land abutting on foreshore, 35, 36.
- party-wall, 127 *et seq.*
- sea-bed, 29, 30.
- soil of highway, presumption as to, 179.
- transmutation of, on shifting of water boundary, 44 *et seq.*

P.

PARCELS,

- interpretation of, general rules as to, 220 *et seq.*
- modes of describing, 220.
- redistribution of, when intermixed, 173.

PARISH,

- boundaries of, generally, 155 *et seq.*
- origin of, according to Blackstone, 155 *et seq.*
- perambulations of boundary of, 159.
- presumption that *medium filum* of highway is boundary of, 158.
- prima facie foreshore not included in, 38, 39.

PARTITION

- of party-wall, 132.

“PARTY-ARCH,”

- definition of, in London Building Acts, 136.

“PARTY-FENCE WALL,”

- definition of, in London Building Acts, 136.

“PARTY-STRUCTURE,”

- definition of, in London Building Acts, 136.
- rights of adjoining owners in London with regard to, 141.
 - building owners with regard to, under London Building Acts, 138 *et seq.*

PARTY-WALL, 127—147.

- contribution towards expense of heightening, under London Building Acts, 147.
- definition of, 127.
- easement of support for, 129.
- negligence in removal of, liability for, 130.
- notice under London Building Acts, 141—143.
- outside area of London Building Acts, 127—133.
- ownership of, 127 *et seq.*
- partition of, 132.
- provisions in London Building Acts regulating building of, 137 *et seq.*

INDEX.

PARTY-WALL—*continued.*

- remedies in case of, 250.
- removal of part of, by several owner, 128.
- repair of, contribution towards, 130.
- tenants in common of, 127.
- whether title to, can be gained by Statutes of Limitation,
within area of London Building Acts, 133 *et seq.* 133.

PERAMBULATIONS, 243.

- of parish boundaries, 159.

PISCARY,

- whether river-bed passes by grant of a, 62.

POLLUTION,

- accessorial right of, 56.
- prescriptive right of, 56 n.
- riparian owner's right to freedom from, 55.

POOR RATE

- assessments, admissible as evidence, 243.

POSSESSION,

- ownership of foreshore presumed on proof of long, 32 *et seq.*
- title based on long, 18 *et seq.*

PRESCRIPTION, 17, 20 *et seq.*

- development of doctrine of, 21 *et seq.*
- distinguished from limitation, 18.
- immemorial, 21.
- mode of laying, for obligation to fence, 108.
- none, where enjoyment secret, 81.
- obligation to fence by, 100 *et seq.*
- presumptive, 22.
- presupposes a competent grantee, 27.
 - grantor, 27.
- grant, 27, 103.
- various forms of, now subsisting, 25, 26.

PRESCRIPTION ACT, 1832, 24—26.

- effect of disabilities on claim under, 25.
- whether easements of support can be claimed under, 81, 82.

PRESCRIPTIVE OBLIGATION

- to fence, discussion of the authorities on, 104 *et seq.*

PRESCRIPTIVE RIGHT,

- none in artificial watercourses made for temporary purposes, 57, 58.
- to pollute water, 56 n.

INDEX.

PRESUMPTION

of ownership—

ad medium aquæ, inland lake, whether any, 49.

non-tidal river, 41.

tidal river, none, 39, 40.

viæ, in case of highways, 179—181.

private ways, 181.

none in case of inclosure roads, 196.

of "balks," none, 184.

bed of inland lake, 49.

non-tidal river, 41.

tidal river, 39, 40.

ditch, 94.

fence, 94.

foreshore, 30, 31.

island in non-tidal river or stream, 41 n.

party-wall, 128.

soil of highway, 179, 181.

private way, 181.

subsoil, 3.

surface, 3.

trees growing on boundary, 204.

wayside strips, 182.

rebuttal of—

of ownership—

ad medium aquæ in non-tidal river, 42.

filum viæ, in case of highway, 181.

private way, 181.

of Crown in tidal river, 39, 40.

of foreshore, 31 *et seq.*

wayside strips, 183, 184.

that conveyance passes bed of non-tidal river *ad medium*

filum aquæ, 42.

soil of highway *ad medium filum*

viæ, 181.

highway extends from fence to fence, 178.

that bed of tidal river vested in Crown, 39, 40.

conveyance of bank includes bed of non-tidal river *ad medium, etc.*, 42.

land adjoining highway includes soil of highway *ad medium, etc.*, 180.

foreshore is extra-parochial, 38, 39.

vested in Crown, 30, 31.

highway extends from fence to fence, 177.

was made before time of legal memory, none, 180.

owner of bank of non-tidal river or stream, owns bed

ad medium aquæ, 41, 42.

effect of island on, 41 n.

fence owns ditch, 94.

several fishery owns bed of river or stream, 61.

surface owns the subsoil, 3.

INDEX.

PRESUMPTION—*continued.*

that person in possession of surface is in possession of subsoil, 3.

wayside strips adjoining common form part of waste, 182.

PROFIT A PRENDRE,

appendant, 12.

appurtenant, 11.

claim of, under Prescription Act, 24 *et seq.*

definition, 7.

may be a right in gross, 11.

Statute of Frauds, an interest in land within, 13.

subject-matters of, 12.

PUBLIC

have no right of fishing in non-tidal rivers, 41.

no right of bathing, 32.

right of fishing in non-tidal inland lake, no, 49.

waters, no, 58.

navigation in inland lake, 49.

non-tidal rivers, 41.

rights of—

in sea-bed, 30.

tidal rivers, 40.

navigation in non-tidal river, 43.

over foreshore, 31, 32.

Q.

QUIA EMPTORES STATUTE, 12.

R.

RAILWAYS,

rights of support for, 86 *et seq.*

statutory obligations to fence, 113 *et seq.*

RECEIVER,

abatement against, appointed by the court, 213.

RECTIFICATION

of deeds, 223.

RE-ENTRY

for breach of covenant to repair fence, 152.

REGISTERED LAND,

boundaries of, 198 *et seq.*

INDEX.

REMEDIES

- for default in repairing fences, 152 *et seq.*
- wrongful confusion of boundaries, 251 *et seq.*
- wrongs done in respect of mines, 123 *et seq.*
- of building owners under London Building Acts, 144 *et seq.*
- where animals escape through fences, 246 *et seq.*

REMEDY

- for injuries caused by overhanging branches or protruding roots, 209 *et seq.*
- of abatement, 211.
- trespass, in respect of party-wall, 131.

RENT,

- adjustment of boundaries under Inclosure Acts on apportionment of, 174.

RENTS,

- commissions for ascertainment of lands charged with, 256.

REPAIR,

- duty of tenant to, fences, 149 *et seq.*
- of fence, 95 *et seq.*
 - fences, tenant's right to cut timber for, 150 *et seq.*
 - highway, *ratione clausule*, 189.
 - ratione tenuræ*, 188.
- highways, adjustment of boundaries of area of highway authority to facilitate, 175, 176.
- inclosure roads, 186.
- party-wall, contribution towards, 130.
- private way, 186.
- re-entry on breach of covenant to, fence, 152.

REPUTATION,

- evidence of—
 - admissibility of, 225.
 - admitted in boundary cases, 226 *et seq.*
 - how far maps are, 235.

RIGHTS *EX JURE NATURÆ*,

- meaning of phrase, 5.

RIGHTS *IN ALIENO SOLO*, 5 *et seq.*

- meaning of phrase, 5.
- public, 6.

RIPARIAN OWNER,

- inland lake, whether soil of, vested in, 49.
- may have natural rights in artificial watercourse, 58.
- right of irrigation, 53.
 - preservation of flow, 55.
 - using water for cattle, 52.
- to consumption of water, 52—54.

INDEX.

RIPARIAN OWNER—*continued.*

- right to embark on inland lake, 49.
- freedom from pollution, 55.
- rights of, 50 *et seq.*
 - arise from access to water, 50.
 - fishing, 59.
 - in natural watercourses, 51 *et seq.*
- what constitutes a, 50.

RIVER,

- alteration of bed of, effect on ownership, 43 *et seq.*
- changes in bed of, effect on ownership, 44 *et seq.*
- embankments, 62 *et seq.*
- ownership of bed of, presumption of, in case of several fishery, 61.
- tidal, Crown *primâ facie* owner of bed of, 39, 40.

ROADS,

- inclosure, 195 *et seq.*
- repair of "main," 187.
- temporary, power of making, pending repairs, 187.
- See* HIGHWAY.

ROOTS,

- no easement for, 207 *et seq.*

"RUNNING SILT,"

- support from bed of, 75.

S.

SEA,

- encroachments of, effect on ownership, 37, 38.
- effect of recession of, on rights *in alieno solo* exercisable by custom, 37.
- inroads of, duty of Crown to prevent, 62, 63.
- recession of, effect on ownership, 36, 37.

SEA-BED,

- definition of, 28, 29.
- ownership of, 29, 30.
- public rights over, 30.

SEA-WALLS, 62 *et seq.*

SERVIENT OWNER,

- no right of, to insist on continuance of easement, 56.

SERVIENT TENEMENT,

- continuance of easement, owner of, cannot insist on, 56.
- definition of, 8.

INDEX.

- SEVERAL FISHERY, 60.
 presumption that, is not a right *in alieno solo*, 61.
 owner of, owns river bed, 61.
- SEVERANCE,
 implied grant of easements upon a, of land, 15—17.
- SEWERS,
 rights of support for, 89 *et seq.*
- SHAFTS,
 obligation to fence, near highways, 118.
- SIC UTERE TUO UT ALIENUM NON LÆDAS*, 4, 69.
- SOIL,
 inland lake, of, ownership of, 49.
 ownership of, of highway, presumption as to, 179.
 See FORESHORE ; RIVER ; SEA-BED.
- STATUTE,
 obligation by—
 to fence abandoned mines, 116.
 mines, 116 *et seq.*
 railways, 113 *et seq.*
- STATUTE OF FRAUDS,
 profit à prendre an “interest” in land within, 13.
- STATUTES OF LIMITATIONS, 18—20.
 effect of, in cases of support, 74.
 whether title to foreshore can be acquired under, 35.
 party-wall can be gained under, 133.
- STRIPS,
 explanation of frequency of wayside, 184, 185.
 presumption as to ownership of wayside, 182.
 rebuttal of presumption of ownership of wayside, 183.
- SUBSIDENCE,
 damages for, in respect of mines, 123.
 each, gives rise to fresh cause of action, 73, 74.
 effect of successive, in cases of support, 73, 74.
- SUBSOIL,
 presumption of ownership of, in surface owner, 3.
- SUPPORT,
 easement of, acquired under statute, 82.
 for buildings from buildings, 78.
 land, 78.
 party-wall, 129.
 easements of, acquisition of, 79 *et seq.*
 whether an easement of necessity, 17.

INDEX.

SUPPORT—*continued.*

- effect of Statutes of Limitations in cases of, 74.
 - successive subsidences in cases of, 73, 74.
- for buildings from land, accessorial right of, 75, 76.
 - no natural right of, 75, 76.
- canals, 88.
- railways, 86 *et seq.*
- sewers, 89 *et seq.*
- waterworks, 88.
- from bed of "running silt," 75.
- implied grant of easements of, 79 *et seq.*
 - for intended building, 79.
- infringement of natural right of, 72.
- natural right of, 69—71.
- no natural right of, for land weighted by buildings, 70, 71.
- of buildings from buildings, no natural rights of, 76, 77.
 - land by land, 70—74.
- prefatory remarks on the law of, 69, 70.
- prescriptive claims to, for buildings, 81.
- substitution of artificial means of, 72.
- water-borne, to land, 74, 75.
- when cause of action arises for removal of, 72, 73.

SURFACE,

- presumption that owner of, owns subsoil, 3.
- right to let down, 78, 83—85.

SURVEY

- by Crown, how far admissible as evidence, 238 *et seq.*
- Down, how far admissible in evidence, 242.
- Ordnance, how far admissible as evidence, 242.

T.

TEMPORARY PURPOSES,

- artificial watercourse made for, no prescriptive right in, 57, 58.

TENANT,

- duty of, to repair fences, 149 *et seq.*
- obligation on, to preserve boundaries of tenement, 148, 149.
- right of, to cut timber for repair of fences, 150—152.

TENANTS IN COMMON

- of boundary trees, 204.
- party-wall, 127.
 - contribution towards repairs, 130.

TENEMENTS,

- implied grants of easements on severance of, 15—17.

INDEX.

- TERRIERS,**
ecclesiastical, how far admissible as evidence, 240.
manorial, how far admissible as evidence, 240.
- TIDAL RIVER,**
ownership of bed of, 39, 40.
- TIMBER,**
tenant's right to cut, to repair fences, 150—152.
- TITHE**
maps, how far admissible as evidence, 237 *et seq.*
- TITHE COMMUTATION ACTS,**
adjustment of boundaries under, 160 *et seq.*
- TITHE RENT-CHARGE,**
apportionment of, where boundaries altered, 163, 164.
- TITLE**
based on long possession, 18 *et seq.*
- TREES,**
no easement for branches of, 207 *et seq.*
 roots of, 207 *et seq.*
overhanging boundary may be cut, 210.
 highway may be cut, 211, 213.
ownership of, on boundaries, 204 *et seq.*
poisonous, how far owner liable for, 210.
prejudicial effect of, protection of highway from, 191.
rule of the civil law as to boundary, 209.
tenants in common of boundary, 204.
when notice ought to be given before cutting overhanging,
 211 *et seq.*
- TRESPASS**
in respect of party-wall, 131.
- TRESPASSER,**
no obligation to fence excavation in favour of, 111.
- TWENTY YEARS' RULE,**
history of doctrine of, in prescriptions, 22 *et seq.*

U.

- UNDERPINNING**
walls under London Building Acts, 143, 144.
- USAGE,**
contemporaneous, to interpret ancient documents, 224.

INDEX.

USQUE AD MEDIUM FILUM AQUÆ,
presumption of ownership, in inland lake, 49.

USQUE MEDIUM FILUM AQUÆ,
presumption of ownership, 62.

V.

VAPOURS,
right of discharging noxious, an easement, 11.

VIBRATION,
right to freedom from, 4.
make undue, easement may consist of, 11.

W.

WATER,
access to, riparian owner's rights based on, 50.
artificially brought into mines, rights as to, 121.
boundaries, 28 *et seq.*
for cattle, riparian owner's right of using, 52.
gravitating in mines, rights as to, 120.
riparian owner's right to consumption of, 52—54.
support from, to land, 74, 75.
use of, for irrigation, 53.

WATERS,
non-tidal, right of fishing in, 58—62.

WATERWORKS,
rights of support for, 88.

WAY,
presumption of owner of soil of private, 181.
public. *See* HIGHWAY.
right to deviate in case of private, 186.

WRECKAGE,
right to, evidence of ownership of foreshore, 33, 34.

WRIT
de curia claudenda, 100, 101.



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